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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 527

COMPANIA ANONIMA VENEZOLANA
DE NAVEGACION (VENEZUELAN LINE)
Petitioner-Libelant Appellant Below

versus

A. J. PEREZ EXPORT COMPANY, ETC. and
TYLER REFRIGERATION CORPORATION,
Respondents-Appellees Below

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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TABLE OF CONTENTS

	Page
Opinions of the Courts Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	4
Facts	4
Argument	8
I. Carrier Law Applicable	8
A. Court Ignored U.S. Shipping Act and Congressional Policy Prohibiting Discrimination in Favor of Shippers	8
B. Application of Principles to Foreign Ocean Carriage	13
C. Conference Tariff Provisions Applicable to Instant Case	14
D. Effect of Tariff Provisions on Liability of Respondents	16
II. Errors of Court Below	16
A. The 5th Circuit is in Direct Conflict with the 10th Circuit	17
B. Isbrandtsen in Same Position Legally as Venezuelan Line	21
1. As Agent	21
2. As Subrogee	21
a. Court Below Indulged in Unpermitted Choice of Law of Subrogation	22
b. Decision in Conflict with Louisiana Law of Subrogation	25
c. Decision in Conflict with Tenth Circuit on Rights of Subrogee of Carrier	27
Reasons for Granting Writs	28
Conclusion	31
Proof of Service	32
Appendix A (Opinion of Court Below)	35
Appendix B (Excerpts, U. S. Shipping Act, 46 U.S.C. 814, seq.)	49

TABLE OF AUTHORITIES

Cases

	Page
Arzipa, 63 F. 2d 42	12
Atchison, T. & S. Ry. Co. v. Chicago, 240 F.2d 930; aff'd, 359 U.S. 77, 78 S. Ct. 1063, 2. L. Ed. 2d 1174	9, 13
Atchison, T. & S. F. Ry. Co. v. White, 49 F. Supp. 797, aff'd, 149 F.2d. 919	13
Barnes v. Crandell, 11 La. Ann. 119	26
Bernstein Bros. Pipe & Mach. Co. v. Denver, 193 F.2d 441 (1951)	12
Compagnie Generale Transatlantique v. American Tobacco Co., 31 F.2d 663, *cert. den.*, 280 U.S. 555	4
Compania Anomina Venezolana de Navegacion v. C. V. Mandry d/b/a Compania Transmares, 171 F. Supp. 290	7
Compania Anomina Venezolana de Navegacion v. A. J. Perez Export Co., et al, 303 F.2d 692	2
Cox v. Baldwin, 1 La. 401	25
Crancer v. Lawden, 315 U.S. 631, 68 L. Ed. 1077, 62 S. Ct. 763	9, 12
Curtis v. Kitchen, 8 Mart. (O.S.) 706	25
Ellston, The, 1936 A.M.C. 1730, 86 F.2d 201	23
Empire Petroleum Co. v. Sinclair Pipeline Co., 282 F.2d 913 (1960)	3, 17, 20, 27, 28
Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188	23, 30
Ford Motor Co. v. Bradley Transp. Co., 174 F.2d 192	24
Guaranty Trust Co. v. York, 326 U.S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079	23, 30
Harvey, The v. Henry, 86 F. 656	23

TABLE OF AUTHORITIES—Continued

	Page
Humboldt, The, 86 F. 351	23
Illinois Central Ry. Co. v. Western Smelting & Refining Co., 123 F. Supp. 3 (1954)	12
International Paper Co. v. Ark. & L. M. Ry. Co., 35 So.2d 769	25
Kossich v. United Fruit Co., 365 U.S. 731, 81 S. Ct. 886	24
Louisville & N. R. Co. v. Central Iron & Coal Co., 265 U.S. 59, 44 S. Ct. 441, 442 (1929)	10, 11
Millaudon v. Colla, 15 La. 213	25
Prince Lines v. American Paper Exports, 45 F. 2d 243, aff'd, 55 F. 2d 1053	9, 13
Purdy v. Forstall, 45 La. Ann. 814	26
Retriever, The, 93 F. 480	23
Richard v. Hogarth, 94 F. 684	23
River Terminal Corporation v. Southwestern Sugar & M. Co., 253 F. 2d 922, 925-6 (5th C. C. A. 1958)	9, 11
Scott v. Featherston, 5 La. Ann. 306	25
Serra é Hijo v. Hoffman, 30 La. Ann. 67	25
United States v. American Union Transport, 327 U.S. 437	5
United States v. Associated Air Transport, Inc. 275 F. 2d 827 (1960)	9, 11
United States v. Kansas City So. Ry. Co., 116 F. Supp. 484, aff'd 149 F. 2d 919	9, 13
Wilburn Boat Co., v. Firemen's Fund Ins. Co., 348 U.S. 310, 75 S. Ct. 668	24, 30

STATUTES

	Page
Louisiana Civil Code:	
Article 8	26
Article 13	26
Article 20	26
Article 2159	25
Article 2161	25
Article 3038	25
Article 3052	25
Article 3053	25
Article 3534	7
United States Constitution:	
Article III	2, 3, 31
Amendment 10	3, 31
United States Code Annotated:	
Title 28, Section 1254	2
Title 46 (Shipping Act)	
Section 801, seq.	4
Section 814	13, 22
Section 815	4, 22
Section 816	4
Section 817	4
Title 49 (Interstate Commerce Act)	
Section 6 (7)	9, 12
Section 402 (a) and (b)	9
Section 906 (c)	9
Section 906-6	12

TREATISES AND OTHER AUTHORITIES

American Jurisprudence:
Vol. 2, "Agency," Section 88, p. 7

American Law Institute, Restatement of the Law of Agency, Section 183

Corpus Juris Segundum
Vol. 36, p. 390 24

Federal Maritime Board, Joint Investigation of Practices of Ocean Freight Forwarders, etc., No. 765 and 831 Consolidated, Recommended Decision on Investigation of Practices of Ocean Freight Forwarders etc., pp. 24-25.

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Petitioner-Libelant Appellant Below

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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To The Honorables, the Chief Justice and the Associate Justices of the Supreme Court for the United States:

The petition of Compania Anonima Venezolana de Navegacion (Venezuelan Line), Libelant in the captioned consolidated suits, civil and maritime, to recover ocean

tariff freights due and unpaid on shipments of refrigerators carried by Libelant from the Port of New Orleans to Venezuelan Ports, respectfuly prays that this Court issue Writs of Certiorari to review the Judgment entered in this case against it by the United States Circuit Court of Appeals for the Fifth Circuit, on the following grounds, to-wit:

OPINIONS OF THE COURTS BELOW

The District Court did not write an opinion. The opinion of the Court of Appeals, Fifth Circuit, is reported in 303 Fed. 2d 692, and is reprinted as Appendix A to this application.

JURISDICTION

Judgment of the Fifth Circuit Court of Appeals was rendered on May 30th, 1962, and an Order denying a Petition for Rehearing was entered on July 17, 1962. The jurisdiction of this Court is invoked pursuant to United States Constitution, Article III, 2, and 28 U. S. C. 1254.

QUESTIONS PRESENTED

Broadly stated, the question presented for review is whether a common carrier by water may be held to be estopped by its or its agent's conduct from collecting freights from a shipper, and thus be required to carry the shipper's cargo free, without discriminating against other shippers contrary to the well established Congressional policy expressed in the United States Shipping Act, pro-

hibiting any discrimination or advantage whatsoever in favor of one shipper over others.

Subsidiary questions presented involve:

1. Whether this decision, or the conflciting decision of the Tenth Circuit Court of Appeals in *Empire Petroleum Co. v. Sinclair Pipeline Co.* 282 F.2d 913 (1960), represent correct Federal Carrier Law with respect to:

a. Estoppel of a common carrier to collect its freights.

b. The extent of the rights of a transferee of a carrier's freight claims to enforce collection.

2. Can a carrier's agent violate with impunity the Shipping Act of the United States, and such agent's conduct create "equities" such as to authorize the shipper likewise to violate the Shipping Act and refuse to pay the freights due by him for ocean carriage to the carrier?

a. Is the answer to the foregoing question in any way affected by the carrier's agent paying to the carrier an amount equal to the freights under a contract of guaranty that should the agent's freight tariff violations result in non-payment of freight monies, the agent would pay an amount equal thereto.

3. Did not the court below violate Article 3 of the United States Constitution and the Tenth Amendment thereto in its choice of subrogation law, if any, applicable to this case?

4. Was the court below constitutionally authorized

to exercise medieval black magic, and by waiving an English Chancellor's "wand of equity," make the Louisiana Civil Law of subrogation disappear and withhold its application to a Louisiana non-maritime contract of suretyship so as to deprive through English Equity and the English Chancellor's "grace" the automatic subrogation to which the surety is entitled under Louisiana Civil Law?

STATUTES INVOLVED

The Statutes of the United States which this case involves are the United States Shipping Act, 46 U.S.C. 801, et. seq. and particularly Secs. 814-817, the pertinent portions of which are reproduced in Appendix B.

FACTS

I

This consolidated suit arises under the United States Shipping Act and is by a common carrier by water in foreign commerce subject to the jurisdiction of the United States Maritime Commission (now the Federal Maritime Board)[1] to enforce collection of its freights against shippers as provided in its Tariffs on file with the Federal Maritime Board. From an adverse decision after a trial on the merits the carrier (Venezuelan Line) appealed, and the Court of Appeals, Fifth Circuit, affirmed.

II

Respondents, Tyler Refrigeration Corporation of Niles,

[1]See 46 U.S.C.A. 815, 816, 817; *Compagnie Generale Transatlantique v. American Tobacco Co.*, 31 F.2d 663, cert. den., 280 U.S. 555.

Michigan, and A. J. Perez Export Company of New Orleans, Louisiana, both shipped refrigeration equipment owned by them, manufactured by Tyler in Niles, Michigan, to the customers in Venezuela over libelant's steamship line. In order to facilitate the shipmetn and handling of their cargoes from Niles to shipside in New Orleans for ocean carriage to Venezuela, they both utilized the services of what is known in the industry as a "freight forwarder"[2] —Alonzo Shipping Co., Inc. of New Orleans. Alonzo was designated by Tyler and Perez, respectively, with respect to each shipment, in the Shipper's Export Declaration Forms filed with the United States Department of Commerce, copies of which were furnished to libelant, as their "agent" and "forwarding agent."[3]

Alonzo performed for Tyler and Perez all of the usual services of a forwarding agent, including the monitoring of the rail portion of the carriage from Niles to New Orleans; the booking of space on the ocean carriers, and selection of the carrier for the particular shipments; the coordination of the movement of the shipment from rail carrier to shipside; the preparation and processing of the multiple copies of the ocean bills of lading, (libelant's Tariff provides for the issuance of only one (1), while the shipper requires multiple copies for Customs, consular and other purposes, including its own records);[4] the preparation and processing of consular documents and export

[2]Ocean freight forwarders are also subject to the jurisdiction of the Federal Maritime Board under the Shipping Act, 46 U.S.C.A. 801 *seq.* See *United States v. American Union Transport*, 327 U.S. 437.

[3]See Exhibit S-2, Items 4, 18, and Instructions II (c).

[4]It is the custom of the industry that where the shipper employs a freight forwarder, such forwarder prepares the bills of lading, in multiple copies, on forms furnished by the carrier. Libelant's Tariff specifically provides that libelant will perform such service for an additional charge therein set forth. See Tariff, Item 19, Exhibit S-2.

declarations; and the payment of ocean freight charges. For these srvices Tyler and Perez each paid Alonzo an agency fee in connection with each shipment. Alonzo was also entitled, according to libelant's Tariff on file with the Federal Maritime Board, to a brokerage of 1¼% on freights on cargoes in connection with which he was designated as forwarding agent by the shippers.

Despite the fact that Alonzo had, in many instances, been furnished by Tyler and Perez with the funds for the prepayment of freights even prior to the time that Alonzo received the original ocean bills of lading for the shipments in question, Alonzo defrauded his principals by failing to pay the freights on the shipments in question to Venezuelan Line, or its agent, Isbrandtsen Co., Inc., and instead, kept the monies furnished him by Tyler and Perez for his own purposes. In at least one other instance, Tyler had caught Alonzo red-handed in such a fraud; but after taking Alonzo's note for the amount of the defalcation, they went ahead doing business with him, entrusting their freight monies to Alonzo for payment to libelant, and even directing libelant to look to Alonzo for payment of freights after having, for a time, paid the freights on various bills of lading direct.

When applying for the signed bills of lading calling for such prepaid freight, Alonzo, instead of paying therefor with the cash furnished him by his principals, or obtaining cash for payment, exercised the "due-bill privileges" afforded to him by Venezuelan Line's local agent, Isbrandtsen, under a well-established custom of the Port of New Orleans described in the recent decision of the

Federal District Court at New Orleans (J. Skelly Wright, Judge) in *Compania Anonima Venezolana de Navegacion v. C. V. Mandry d/b/a Compania Transmares*, 171 F. Supp. 290. In this fashion Alonzo received, between July 9 and August 6, 1954, three (3) bills of lading involving freight totaling $4,607.88 for the account of Tyler Refrigeration Corporation, and five (5) bills of lading between June 11 and November 26, 1954, involving freight totaling $7,878.65 for the account of A. J. Perez Export Company, without paying the freights due thereon. In each instance the bills of lading were taken out on due bills for which Alonzo never remitted to Venezuelan Line, or its agent, Isbrandtsen, the freight monies furnished him for that purpose by his principals, Tyler and Perez.

Under Louisiana Law, freight claims prescribe in one year. (La. Civil Code Article 3534) Repeated demands were made throughout the year on respondents' agent, Alonzo, for payment of the freights, all without avail. Finally, on May 9, 1955, well in advance of the limitation date (June 11, 1955), libelant resorted to making demand directly on the shippers, Tyler and Perez, pursuant to tariff and bill of lading provisions, for the payment of the freights, equally without avail, respondents refusing at all times to pay the freights. Under such circumstances, libelant then called upon its local agent, Isbrandtsen Co., Inc., to honor its guaranty of "due bills" permitted by it, as contained in its Agency Agreement, which Isbrandtsen promptly honored by remitting the amount which Tyler and Perez refused to pay on May 24, 1956. Shortly thereafter, these two separate libels were instituted by Venezuelan Line against the shippers, Tyler and Perez, on the

shipments made by each individually, which were subsequently consolidated and treated as one case for all practical purposes, in view of the identity of the issues presented.

ARGUMENT

I. Carrier Law Applicable

The Circuit Court of Appeals, in its most curious Opinion, ignored all of the realities of this case as a suit by a carrier to collect its unpaid tariff freights from the shippers, and out of kindheartedness in not wanting to force the shippers, whom it deemed "innocent," to pay the freights twice (once to their own defalcating agent, who they themselves chose to entrust with their funds, and second to the carrier to whom it was their obligation under the Shipping Act to see actually received the freight monies embezzled by their agent), treated the case rather as "a contest of equities, not betwen the carrier and a shipper, but between a subrogee of a carrier and that shipper." While we must confess that we can see no equity in favor of the principal whose own agent embezzles his funds as against a third person who rendered services to the principal for which he was never paid, we suggest that the posture of the case really makes any consideration of the private equities personal to the parties immaterial to a proper decision of this controversy.

A. Court Ignored United States Shipping Act and Congressional Policy Prohibiting Discrimination in Favor of Shippers

It is respectfully submitted that the basic error of the

Court in its opinion and decision in this case stems from the fact that it was so carried away by what it considered the "equities" of the case between the parties that it completely ignored and brushed aside the United States Shipping Act, the Freight Tariffs of Venezuelan Line on file with the Federal Maritime Board, and the entire well-established Congressional policy expressed in the Shipping Act and the Interstate Commerce Act, and interpreted and enforced in literally a thousand court and I.C.C. decisions, prohibiting any discrimination or advantage whatsoever in favor of one shipper over others.[5] Yet the Shipping Act, the Tariff, and Congressional policy as expressed in its legislation prohibiting discrimination in charging and collecting freights is obviously the very heart of this case.

The stark, undisputable fact of this case is that Libelant carried Respondents' cargo from New Orleans to Venezuela free, without receiving one penny of freight money for it, and Respondents paid no freights to Libelant, despite Repondents' bill of lading agreement to pay freight, contrary to its Tariffs, in violation of the Shipping Act, and contrary to Congressional policy as expressed in said act and elsewhere that interstate and foreign common carriers *must* enforce their tariffs and *must* collect and

[5]The overriding public policy against any practice or conduct even smacking of rate discrimination in any form has found expression by Congress in every statute regulating commerce since the early enactment of the Interstate Commerce Act., including the more recent Shipping Act and Civil Aronautics Act. See United States Code, Title 49, particularly Section 6 (7) and 906 (c); see also *Crancer v. Lawden*, 315 U.S. 631, 68 L. Ed. 1077, 62 S. Ct. 763; *Atchison, T & S.F. Ry. Co. v. Chicago*, 240 F.2d 930; aff'd, 359 U.S. 77, 78 S. Ct. 1063, 2 L. Ed. 2d 1174; *U.S. v. Kansas City So. Ry. Co.*, 116 F. Supp. 484, aff'd, 149 F.2d 919; see also *Prince Lines v. American Paper Exports*, 45 F.2d 243, aff'd, 55 F.2d 1053; *River Terminal Corporation v Southwestern Sugar & M. Co.*, 253 F.2d 922, 925-6 (5th C.C.A. 1958); see also U.S. Code Title 49, Section 402 (a) and (b), *United States v. Associated Air Transport, Inc.*, 275 F.2d 827, 833 (1960).

receive their freights at the tariff rate, and shall not discriminate in favor of any shipper, or carry the cargo of one shipper at a reduced rate — or free — while enforcing and collecting the tariff rate against others; and that shippers *must* pay the tariff freight to the carrier, despite any conduct on the Carrier's part. Indeed, that the carrier's own agent should pay an amount equal to the freights to the carrier under a guaranty agreement with the carrier compounds the violation, rather than mitigates or excuses it, as the Court below in effect held.

Thus, it is really unimportant to a decision of this case whether Isbrandtsen or Venezuelan Line did any of the things the Court found it did, because the fact still remains that neither Isbrandtsen nor Venezuelan Line is any more permitted to violate their own tariffs than anyone else and permit free shipments of cargo to Venezuela without the pre-payment of freight. And it is a well settled carrier law— enforcing the aforesaid public policy — that a carrier's violation of its own tariffs (and a carrier *always* acts through agents), its ignoring of same, or even its misrepresentations in connection therewith, does not absolve the shipper of his duty to adhere thereto or estop the carrier from enforcing same and collecting and receiving tariff freights. So strong is the public policy in this field of the law that it overrides all individual personal equities whatsoever. The freights *must* be collected, enforced and paid!

One of the most frequently cited and earliest cases interpreting and enforcing this policy was *Louisville &*

N.R. Co. v. Central Iron & Coal Co.[6] in which this Court held:

> "The shipment being an interstate commerce one the freight rate was that fixed in the tariff filed with the Interstate Commerce Commission . . . Thus they were fixed by law. No contract of the carrier could reduce the amount legally payable or release from liability a shipper who had assumed to pay the charges. Nor could any act or omission by the carrier (except the running of the statute of limitations) estop it or preclude it from enforcing payment of the full amount by a person liable therefor."

See also *River Terminal Corp. v. Southwestern Sugar & M. Co.*[7]

In *United States v. Associated Air Transport*,[8] the court noted:

> "Filed as it was under compulsion of Sec. 403(a) of the Civil Aeronautics Act of 1938, the tariff carried the statutory mandate of Sec. 403(b) that it and it alone was to be the sole standard for services to be rendered and charges assessed and collected. In the implementation of this stringent legislative policy, the courts have been equally emphatic that the basis for the charge or credit must be found in the tariff. . . .
> It is not a mere matter of contract. For a rate once published is no longer the rate imposed by the carrier but becomes the rate imposed by law. . . .

[6] 265 U.S. 59, 44 S. Ct. 441, 442 (1929).
[7] 253 F.2d 922 (5th C.C.A. 1958).
[8] 275 F.2d 827, 832-833.

> As a natural corollary to such a dynamic policy prohibiting the possibility or temptation to preferential discrimination . . . is the equally uncontradicted legal proposition that *estoppel cannot be invoked against a common carrier to avoid a tariff provision.* Neither the intentional nor accidental misstatements of the applicable published rate will bind the carrier or shipper (citing authority).
>
> *It is clear that no act or omission of the carrier can estop or preclude it from enforcing payment of the full amount of the tariff charges.* (citing authority) *And equitable considerations may not serve to justify failure of a carrier to collect or retention by shipper of any part of the lawful tariff charges.*[9] (Emphasis added)

A great wealth of jurisprudence to this effect has been built up under the various provisions of the Interstate Commerce Act,[10] applicable to rail, pipeline, motor, communications, inland waterways, and other types of carriage. Uniformly the courts permit no deviation whatsoever from Tariff provisions on the ground that to do so in any respect derogates from the pervading public policy of non-discrimination among shippers and opens the door to favoritism and the unjust discrimination it is the policy of the law to suppress. Thus the courts have uniformly held that:

> ". . . tariffs bind both carriers and shippers with the force of law"[11]

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[9]See also *Arzipa*, 63 F.2d 42, 43; *Bernstein Bros. Pipe & Mach. Co. v. Denver*, 193 F.2d 441 (1951); *Illinois Cent. Ry. Co. v. Western Smelting & Refining Co.*, 123 F. Supp. 3 (1954).

[10]See U. S. Code, Title 49, particularly Sec. 6 (7). For interstate water carriers, see Sec. 906-6.

[11]*Crancer v. Lawden*, 315 U.S. 631, 86 L. Ed. 1077, 62 S. Ct. 763.

> "A tariff under provision . . . requiring every common carrier to file . . . is to be treated the same as a statute."[12]

> ". . . the legally published tariff of a carrier may not be avoided, enlarged, or varied, by the shipper or the carrier by contract, express or implied, *or by the tort of the carrier*, and so long as published tariff remains operative, it is binding on shipper and carrier alike, and must be enforced by courts in fixing rights and liabilities of parties. . ."[13] (Emphasis added)

> "Tariff provisions have the force and effect of a statute, and cannot be deviated from."[14]

B. Application of Principles to Foreign Ocean Carriage

The Shipping Act[15] requires common carriers by water to file with the Federal Maritime Board its "conferences" — of which the "conference" adhered to by libelant[16] is one — which, upon filing and approval, become tariffs for regulation of freights "having force of law,"[17] as in the case of I.C.C. tariffs. As said by the Court in *Prince Line v. American Paper Exports, Inc.*[18]

> "Every consideration referred to by the Supreme Court in these cases (i.e., the authorities referred to above) applies with equal force and effect to the provisions of the Shipping Act . . ."

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[12] *Atchison, T. & S.F. Ry. Co. v. Chicago*, 240 F.2d 930, aff'd, 359

[13] *U.S. v. Kansas City So. Ry. Co.*, 116 F. Supp. 484.

[14] *Atchison, T. & S.F. Ry. Co. v. White*, 49 F. Supp. 797, aff'd, 149 F.2d 919.

[15] 46 U.S.C.A. 814.

[16] See Libel, Paragraph II, and Exhibit S-2.

[17] *Prince Line v. American Paper Exports, Inc.*, 55 F.2d 1053.

[18] *Id.*

C. Conference Tariff Provisions Applicable to Instant Case

The tariff provision applicable to this case is Freight Tariff No. 6 of the United States Atlantic & Gulf-Venezuela and Netherlands Antilles Conference, adhered to by Venezuelan Line.[19] Item 5 of the Tariff provides that the terms and conditions of the bill of lading shall govern and regulate the shipment and carriage of goods over the line. The pertinent provisions of the bills of lading, incorporated into the Tariff, under which each of the shipments here in question moved, are as follows:

> "In accepting this bill of lading the shipper, consignee and owner of the goods agree to be bound by all of its stipulations, exceptions, and conditions, whether written, printed, or stamped on the front or back hereof, any local customs or privileges to the contrary notwithstanding."
>
> "2. . . . the word 'shipper' shall include the person named as such in this bill of lading and the person for whose account the goods are shipped; . . ."
>
> "15. . . . Full freight hereunder to port of discharge named herein shall be considered completely earned on shipment whether the freight be stated or intended to be prepaid or to be collected at destination and the Carrier shall be entitled to all freight and charges due hereunder, whether actually paid or not, ... All unpaid charges shall be paid in full and without any offset, counterclaim or deduction in the currency of the port of shipment, ... The shipper and the consignee shall be jointly and severally liable to the

[19]Exhibit S-2.

Carrier for the payment of all charges and for the performance of the obligation of each of them hereunder."

"21. This bill of lading shall be construed and the rights of the parties hereunder determined according to the laws of the United States."

"27. All agreements or freight engagements for the shipment of the goods are superseded by this bill of lading, and all its terms, whether written, typed, stamped, or printed, are accepted and agreed by the shipper to be binding as fully as if signed by the shipper, any local customs or privileges to the contrary notwithstanding. Nothing in this bill of lading shall operate to limit or deprive the Carrier of any statutory protection . . ."

"29. False billing. Attention of shippers, consignors, consignees, forwarders, brokers and other persons is called to the provisions of the Shipping Act (46 U.S. C.A. 815), providing penalties for false billing, false classifications, false weighing, false report of weight, or any other unjust or unfair device or means, to obtain or attempt to obtain transportation by water of property, at less than the rates or charges which would otherwise be applicable."

Item 7 of the Tariff additionally provides:

"ITEM 7—PREPAYMENT OF FREIGHT CHARGES:

(a) All freight and charges must be prepaid in currency of the United States in the United States."

D. Effect of Tariff Provisions on Liability of Respondents

It will be observed from the above provisions that Tyler and Perez, as the "person for whose account the goods are shipped" are "shippers" pursuant to B/L Clause 2, *supra*. Pursuant to Clause 15, *supra*, Tyler and Perez, as "shippers" are "jointly and severally liable to the Carrier (Venezuelan Line) for the payment of all charges." As it is admitted that neither Tyler nor Perez has ever paid Venezuelan Line the freight charges for the shipments involved, and that Alonzo, instead of paying same, put the money furnished him for that purpose in his own pocket, it follows that respondents Tyler and Perez, under the plain provisions of the Tariff, are liable therefore to Venezuelan Lines, quite regardless of any liability of Alonzo to Isbrandtsen or of the payment of an amount equal to the freights by Agent Isbrandtsen to the carrier under its guaranty agreements. The case is really as simple as that!

II

ERRORS OF THE COURT BELOW

Curiously enough, the court below admitted the validity of the Carrier Law as above set forth, but then evaded the impact of the law on respondents. In so doing, the court traveled over uncharted seas and injected issues into the case that had not been previously briefed or argued, and which indeed are not subject to argument, because the court indulged in medieval black magic, and the waving of wands and in the exercises of the grace of the English

Chancellor to make the law disappear, and to free their "innocents" of liability.

The Fifth Circuit Court of Appeals said:

> "It is harsh enough when, vis-a-vis Carrier and Shipper, it is the law that commands a shipper to pay twice if the carrier has not in fact received the money. It is shocking to say that equity would compel it. In the contest of relative equities, he who now seeks the Chancellor's grace has set the whole train of misfortune in motion. No longer having the "legal" standing of a carrier whose peremptory mace might compel a court of law to grant relief, the real libellant has naught but the gentle "wand of equity,". . . .

It is respectfully submitted, that in so doing, the Fifth Circuit Court of Appeals fell into grievous error in many respects as set forth below:

A. The Fifth Circuit is in Direct Conflict with the Tenth Circuit

Practically this identical case was recently submitted to the Tenth Circuit Court of Appeals in *Empire Petroleum Co. v. Sinclair Pipeline Co.*,[20] in a pipeline carriage, rather than an ocean carriage, setting.

In *Empire*, Sinclair Pipeline Co. brought five separate claims against Empire, four of which are of interest here, three being for transportation charges for carriage of oil under circumstances quite similar to the carriage by Venezuelan Line here. The oil originated in Little Beaver field,

[20] 282 F.2d 913 (1960).

Colorado, and belonged to Denver Basin Oil Co. who sold it to Empire (then Wisconsin Oil Refining Co.) delivered in seller's tanks in Little Beaver Field via the pipeline of Goodall Pipeline Co., pursuant to a contract naming Marson Crude Oil Co., a crude oil marketing company, as "transporter" (akin to "freight forwarder") for ultimate delivery to Empire in Wisconsin via Sinclair's pipelines and rail. The contract provided that Empire should pay all transportation and storage charges.

Transportation (or "forwarding") arrangements for the oil was made both with Sinclair and Goodall pipelines companies by Marson, represented by Marmaduke. In both instances it was fully disclosed by Marson that the shipments were made either to, or for the account of, Wisconsin (Empire). With full knowledge on the part both Goodall and of Sinclair of Wisconsin (Empire) as consignee — and indeed also as owner in the case of Goodall — both carriers, like Venezuelan Line in the instant case, nevertheless dealt exclusively with Marson for their freights, billing Marson for them only, and never during the course of their dealings making any demands on Wisconsin (Empire) for transportation charges. Marson in turn billed Wisconsin (Empire) for the transportation charges, and was fully paid the freight, but as in the case at bar, Marson like Alonzo, failed to remit the freight monies received by it from Empire to the carriers.

When the transportation charges continued unpaid, Goodall and Sinclair, still without notifying or advising Empire, each "even went to the extent of taking p[illegible]missory notes" signed not only by Marson, but by Marmeduke

and his wife as well, specifically providing that as part of the consideration therefor, the original debt for transportation charges was cancelled and novated. This Venezuelan line never did!!

Finally, upon the notes not being paid at their maturity, Sinclair brought suit against Empire as consignee of the various shipments for sums due under carrier tariff provisions, alleging as its first two claims transportation charges for two separate 50,000-barrel shipments of oil carried through its own interstate pipelines, as its fourth claim, an assignment of the unpaid transportation charges due Goodall for its intrastate carriage of oil, and as its fifth claim, unpaid rentals on storage facilities and other costs incurred at Monee, Illinois, in connection with said oil, pursuant to a contract between Sinclair and Marson.

With respect to the first two claims, where similar defenses were urged by Empire to the defenses asserted here by Respondents, the Court brushed such defenses aside and held Empire, as consignee, liable under Sinclair's tariff, saying:

> "and although it is apparent that during the entire course of dealing, Sinclair (the carrier) made no demand upon Wisconsin (the consignee) for costs of transportation and looked exclusively to Marson (the forwarder) even to the extent of taking a promissory note in purported cancellation of transportation charges, still such conduct will not operate in law to estop Sinclair from asserting its delayed claim against Wisconsin or relieve that company from its liability to pay the cost of transportation for oil consigned to it. And this

> remains true even though Wisconsin completely settled its account with Marson. *The compulsion of the Interstate Commerce Act is such that intricacies of private contract cannot be permitted to result in rate discrimination actual or potential.* This rule is necessary to prevent collusionary discrimination between shipper and carrier and results in the consignee being liable for transportation costs as a matter of law upon his acceptance of goods from the carrier and regardles of any consignor-consigne contract to the contrary (citing authority). *Nor will any act or omission of the carrier estop or preclude it from enforcing payment of the full amount under the tariff by a person liable therefor. . . .* (Emphasis added)

Thus, the very elements relied on by the Circuit Court[21] as decisive in the instant case and requiring a decree relieving Respondents from the payment of freight[22] were equally present in *Empire* and were held by the Circuit Court of Appeals to be ineffective against the paramount public policy of the United States prohibiting rate discrimination. Indeed, the carrier in *Empire* went much further in estopping itself, creating equities, and in inducing injurious reliance, than Libelants ever did here.[23] The carrier itself in *Empire* purported not merely to extend credit to the forwarder on transportation charges, but to cancel and novate the freight charges completely in exchange for promissory notes given by strangers to the transaction.[24] The instant decision is therefore in direct conflict with *Empire*, as tacidly admitted by the Fifth Cir-

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[21] R. p. 383.
[22] R. p. 383-384.
[23] R. p. 384.
[24] R. p. 384-385.

cuit in the last two lines of footnote 12 of its Opinion herein.

B. Isbrandtsen in Same Position Legally as Venezuelan Line

1. As Agent

The Court below went to great lengths in eliminating Venezuelan Line as the libelant, and in defining Isbrandtsen as the real party in interest. Yet the court at all times recognized that Isbrandtsen was the agent and alter ego of Venezuelan Line and it is impossible to understand a process of reasoning which will permit an agent to avoid the consequences of the Shipping Act while the court admits that its principal, the carrier, cannot. As will be shown below, this opens a whole Pandora's box of avenues of escape for a carrier to discriminate for or against shippers as he pleases in the collection of freight through the mere interposition of an agent.

2. As Subrogee

The Court assumes that Isbrandtsen is the real party at interest in this proceedings simply because Isbrandtsen paid an amount of money equal to the freights to Venezuelan Line. But this is an oversimplification and a complete *non sequitur* because Isbrandtsen paid not freights to Venezuelan Line, but honored its contract of guaranty only after the shippers themselves had refused to pay the freights. In so doing, Isbrandtsen was not paying freights, but discharging its obligation as surety. Pursuant to the Shipping Act, Venezuelan Line was still under criminal

liability (See Shipping Act, 46 U. S. C. 814-815 last paragraph) to collect the freights from the shippers, and not to permit its agent to substitute its funds for those of the shipper, and thus discriminate in the shipper's favor. Payment by Isbrantsen under its guaranty, never released, nor was it ever intended to release, respondents Tyler and Perez, but at the very worst subrogated Isbrandtsen to Venezuelan Line's rights and actions against them. Indeed, it is at this point at which the court below indulges in its most bizarre flights of magical medieval fancy in making such rights disappear, even though acknowledged.

a. Court Below Indulged in Unpermitted Choice of Law of Subrogation

The Court below completely misconceived the fundamental nature, role, and law of subrogation applicable in this case. The Opinion concedes that plaintiff carrier is entitled to recover (Opinion, pp. 5, 10, 15); concedes that agent Isbrandtsen is entitled to *seek* subrogation to the rights of the carrier (p. 7), and if subrogated to the "legal standing" of the carrier, is entitled to prevail in this suit (p. 10). But the Court—not on the basis of any law—but by the exercise of black magic dredged up from the Medieval English Chancellor of Equity waiving his "Wand" (p. 10)—assumes authority to withhold its "grace" (pp. 8, 9, 10) from plaintiff and deny it subrogation.

But the application of English Equity to the Louisiana Law of Subrogation has no place whatever in this case, and indeed is prohibited by the United States Constitution and decisions of the Supreme Court. It is hornbook law that

> "In giving federal courts cognizance of equity . . . Congress never gave, nor did the federal courts ever claim, the power to deny substantive rights created by state law . . . On the contrary, the federal courts sitting in equity were and are bound to enforce substantive rights created by state law . . ." 36 C.J.S., 339, *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079.

Subrogation here is not derived either from Admiralty or from the English Equity, but arises exclusively from the Louisiana Law of suretyship as a result of payment under a contract of guaranty made and to be performed in Louisiana — i.e., the Agency Agreement between Isbrandtsen and Venezuelan Lines!

Such an agreement is a non-maritime contract over which Admiralty has no power, authority, or jurisdiction. (*The Humboldt*, 86 F. 351; *Richard v. Hogarth*, 94 F. 684; *The Harvey v. Henry*, 86 F. 656; *The Retriever*, 93 F. 480; *The Elkton*, 1936 A.M.C. 1730, 86 F. (2d) 201. It becomes involved in this case only by way of defense. The Court is prohibited from applying to it any law except the law of the State of Louisiana—and certainly has no justification for applying English Equity to deny enforcement of the Louisiana Law of Subrogation, of which English Equity is no part. 28 U.S.C.A. 1652; *Erie R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188.

Even in the case of an unquestionably maritime contract such as one of marine insurance, subject to admiralty jurisdiction, the Supreme Court refused "to fashion controlling federal rules" and held:

". . . the scope and validity of the policy provisions here involved and the consequences of breaching them can only be determined by state law." *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 316, 75 S.Ct. 668, 371.

If state law is controlling even of maritime contracts, then it is unthinkable for an Admiralty Court to deny the application of Louisiana Law to a Louisiana non-maritime contract — not even on the basis of admiralty law, but on the basis of English Equity!!! *Kossick v. United Fruit Co.*, 365 U.S. 731, 81 S.Ct. 886. See also, 275 F. 2d 500; *Ford Motor Co. v. Bradley Transp. Co.*, 174 F. 2d 192. While as the Court below says, with permission of the Admiralty, "the Chancellor . . . may stride the quarter-deck of maritime jurisprudence and, in the role of Admiralty Judge, dispense . . . that which equity and good conscience impels," the Chancellor has no such permission to trample the Civil Code of Louisiana and tear up its law of subrogation or, like Merlin of King Arthur's Court, waive a magic wand to make it disappear—and the Admiralty can give the Chancellor no such authority, regardless of personal feelings in the matter. As said in 36 C.J.S. 390-392:

"(Even) Where a question of state law is not covered by a state statute, a federal court may not determine the question independently, but must determine it as the state court would and *must follow state court decisions even though the state court rulings are contrary . . . to the views of the federal court.*" (Emphasis and part in parenthesis added)

b. Decision in Conflict with Louisiana Law of Subrogation

The Louisiana Law of the rights acquired by Isbrandtsen upon payment of the amount of freights due by shippers pursuaunt to its contractual guarantee under its non-maritime contract of agency with Venezuelan Lines, are clear, both under the Louisiana Civil Code and the decisions of the Louisiana Courts. Pursuant to the express provisions of Louisiana Civil Code Articles 3038, 3052, 3053, and 2161 (3), its subrogation is legal and "takes place of right" (Articles 2159, 2161) and not as a matter of grace, as in English Equity!!

Furthermore, the uniform decisions of Louisiana Courts establish that subrogation under Louisiana Law is a matter of absolute right, occurs *ipso facto* by mere operation of law, and entitles the subrogee to every right and action and security of the creditor, into whose shoes he is put. In Louisiana one does not "*seek*" subrogation—one *acquires* it, by automatic operation of law, upon the payment of the debt of another for which he is bound. See:—

Serra é Hijo v. Hoffman, 30 La. Ann. 67;

Scott v. Featherston, 5 La. Ann. 306;

Curtis v. Kitchen, 8 Mart (O.S.) 706;

Millaudon v. Colla, 15 La. 213;

Cox v. Baldwin, 1 La. 401;

International Paper Co. v. Ark. & L.M. Ry. Co., 35 So. 2d 769.

Delay of a creditor in enforcing his rights does not

release the surety, who may pay the debt and become subrogated.

Purdy v. Forstall, 45 La. Ann. 814, 13 So. 95;

Barnes v. Crandell, 11 La. Ann. 119.

Never, in the history of subrogation in Louisiana, has an English Chancellor waived a wand and made subrogation rights incorporated in the Civil Code disappear, nor has or can any Court ever exericse a discretion to deny it. The distinction drawn in the Court's Opinion, p. 7, between *seeking* and *attaining* subrogation is absolutely invalid in Louisiana, because in Louisiana the right is legal — not equitable — and flows automatically from the payment of the debt of another. Indeed, the whole concept of a court's or Chancellor's authority to exercise "grace" to withhold enforcement of legal rights or remedies granted by the Civil Code is repugnant to the Civil Law and is repudiated in Louisiana by Articles 8, 13, and 20 of the Civil Code which especially enjoins courts that:

> "The law is obligatory upon all inhabitants of the State, indiscriminately . . ." (Even judges!)
>
> "When a law is clear and free from all ambiguity, the letter of it is not be disregarded, under the pretext of pursuing its spirit."
>
> "The distinction of laws into odious laws and laws entitled to favor, with a view to narrowing or extending their construction, cannot be made by those whose duty it is to interpret them."

The English Chancellor and his "grace" is thus denied

naturalization in Louisiana, and no court possesses the magicl powers of Sorcerer Merlin to waive a wand and make the letter of the law of subrogation as incorporated in the Code disappear "under the pretext of pursuing its spirit."

c. Decision in Conflict with Tenth Circuit on Rights of Subrogee of Carrier

The decision of the Court below is in flat opposition to the decision of the Tenth Circuit Court of Appeals in *Empire Petroleum Company v. Sinclair Pipeline Company, supra*, recently decided, where the Tenth Circuit Court of Appeals allowed plaintiff subrogee, who had even accepted notes from the "forwarder," to recover as assignee or subrogee of a carrier, holding, contrary to the Fifth Circuit in this case:

> "Since Sinclair takes by assignment, it can neither improve nor lose the rights of its assignor in this regard."

Hence, the Court, by misconceiving the law applicable to the subrogation involved in this case, has prepetrated both an historic and geographic, to say nothing of jurisdictional, anachronism in imposing a medieval Chancellor's "magic wand" on the civil law of subrogation in Louisiana as applied in a setting of 20th Century carrier law, leading this Court into direct conflict with the more mundane decision of the Tenth Circuit in *Empire Petroleum Co. v. Sinclair Pipeline Co.*, 282 F. 2d 913, which applies strict 20th Century carrier law unencumbered by Medieval Magic and arrives at the same result made imperative by the Louisiana Law of Subrogation.

REASONS FOR GRANTING WRITS

Your petitioner suggests the following reason why this Honorable Court should grant the prayer of this petition:

I

The decision of the Fifth Circuit Court of Appeals in the instant case is in direct confliet with the decision of the Tenth Circuit Court of Appeals in the case of *Empire Petroleum Co. v. Sinclair Pipeline Co.*, 282 F. 2d 913, recently decided in 1960. It is likewise in conflict with the law and decisions of the Supreme Court of the State of Louisiana, which law should govern the incidence of non-maritime suretyship involved in this case, in so far as it holds that the exercise of the rights of the surety are regulated by English Equity and are subject to being withheld by the exercise of the Chancellor's "grace," while under Louisiana law and decisions subrogation is immediate and automatic and not subject to "grace."

II

The extent to which, and the circumstances under which, shippers in interstate and foreign commerce may obtain preferences in freight carriage, is a matter not only of national, but of international importance in the setting of this case where ocean freights are involved. Heretofore, this court, and other courts, have jealously guarded and zealously enforced the strong policy expressed by Congress in the Interstate Commerce and Shipping Acts of United States against "not only discrimination, but the possibility

of it." So far as we have been able to find this case represents the first breach in the impregnable judicial wall supporting the firm Congressional policy of non-discrimination among shippers in the payment of freights; and in accomplishing such breach this decision is not only directly and immediately in conflict with the decision of the Tenth Circuit Court of Appeals in the *Empire Petroleum Co.* case, *supra*, but conflicts in theory with all other reported cases on the same subject.

III

In permitting equities of an agent of a carrier to be seized upon and set up as an excuse for permitting a shipper to violate his obligation under the Shipping Act to pay the freights to the carrier, a whole Pandora's Box of avenues of escape has been opened up by this decision to permit discrimination and preference in favor of certain favored shippers.

As this court knows, all carriers operate through agents; and all carriers, even regardless of guaranty agreements, are entitled to recover from their agents where the agent fails, neglects, or refuses to collect the freights from the shipper. If the mere fact that the agent of the carrier has paid, or is liable for the payment of, the uncollected freights, due by the shipper to the carrier makes it possible for the shipper, in a suit by the carrier, to set up equities against the agent as a defense to the payment of the freights he is obligated to pay to the carrier under the Shipping Act, then there becomes very little left to the Congressional policy against preferential and discriminatory treatment of shippers in rates and the payment of

freights. The thousands of variations to which such principal established by this case can be put to use in business transactions will undermine the Congressional policy heretofore so zealously guarded by the courts.

IV

Prior to the instant decision, it was the uniform holding of the courts that shippers as well as carriers had the absolute, unevadable, obligation of complying with the Congressional policy against non-discrimination, and of paying tariff freights to the carrier — not merely to a "forwarder." This decision absolves shippers completely of any obligation to pay the freights where some "equity" can be found, and payment compelled, against the carrier's agent. This completely defeats the Congressional policy, and violates the very letter of the Shipping Act and tariff filings thereunder.

V

The decision in this case similarly is contrary to innumerable decisions of this court, including *Erie Ry. Co. v. Tompkins; Guaranty Trust Company v. York* and *Wilburn Boat Co. v. Firemans' Fund Insurance Co., supra*, prohibiting Federal Courts from applying alien law to matters properly within the jurisdiction of the laws of the individual states. This decision completely violates any such principals by importing into a local Louisiana non-maritime agency agreement the concepts of English Equity foreign to the Louisiana Civil Law of automatic subrogation in order to defeat rights otherwise protected under Louisiana law. This is a most dangerous invasion of local

sovereignty which this court has always been careful to guard against, and violates not only Article III of the United States Constitution, but the Tenth Amendment as well.

CONCLUSION

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may issue directed to the United States Court of Appeals for the Fifth Circuit commanding that court to certify and to send to this court a full and complete transcript of the record of all proceedings of said court in the above-entitled cause, to the end that said cause may be reviewed and determined by this Court as provided by law.

And your petitioners will ever pray.

JAMES J. MORRISON
1007 National Bank of Commerce Building
New Orleans 12, Louisiana
Proctors for Petitioners.

STATE OF LOUISIANA
PARISH OF ORLEANS } ss.:

JAMES J. MORRISON, being duly sworn, says that he is Proctor for petitioner herein; that he has prepared and read said petition subscribed by him, and that the facts therein stated are true and correct to the best of his knowledge, information and belief.

JAMES J. MORRISON

Sworn to and subscribed before me
this day of October, 1962.

Notary Public
My Commission is granted for life.

I HEREBY CERTIFY that I have examined the foregoing petition. In my opinion the petition is well founded and the cause is one in which the prayer of the petitioner should be granted by this Honorable Court.

JAMES J. MORRISON

PROOF OF SERVICE

I, James J. Morrison, Proctor for Compania Anonima Venezolana De Navegacion (Venezuelan Line), petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify, pursuant to Rule 33,3(b), that on the 14th day of October, 1962, I served

copies of the foregoing Petition for a Writ of Certiorari to the United States Supreme Court on Tyler Refrigeration Corporation and A. J. Perez Export Company, respondents, by mailing a copy in a duly addressed envelope, first class postage prepaid, to Messers. Kierr and Gainsburgh, 1740 National Bank of Commerce Building, New Orleans 12, Louisiana, their counsel of record.

JAMES J. MORRISON

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19117

COMPANIA ANONIMA VENEZOLANA DE NAVEGACION (VENEZUELAN LINE)

Apellant,

versus

A. J. PEREZ EXPORT COMPANY, ETC. and TYLER REFRIGERATION CORPORATION,

Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

(May 30, 1962)

Before RIVES, BROWN, and WISDOM, Circuit Judges.

BROWN, Circuit Judge: While the case ostensibly presents the question whether a common carrier by water

may ever estop itself by inequitable conduct from exacting the full measure of the shipper's obligation to pay tariff charges, the true nature shows it to be something quite different. What it really is, is a contest of equities, not between the carrier and a shipper, but between a subrogee of a carrier and that shipper. Without quite putting the case in these terms, the trial Court in two consolidated admiralty libels held in favor of the Shipper. Doing so, the Court denied recovery of freight charges claimed in the name of the Carrier, but actually sought by a berth agent (in the Carrier's name) to reimburse itself for freight uncollected from a Freight Forwarder and made good to the Carrier pursuant to the credit guarantee in the agency agreement. We affirm.

If there ever were a case in which fact findings of the trial Judge should be accorded the great respect required by the clearly erroneous concept of the Civil Rules, now incrusted on the hull of maritime jurisprudence, *O/Y Finlayson-Forssa A/B v. Pan Atlantic S.S. Corp.*, 5 Cir., 1958, 259 F. 2d 11, 13, 1958 AMC 2070; *Myles v. Quinn Menhaden Fisheries, Inc.*, 5 Cir., 1962, — F. 2d —, — AMC — [No. 19256, April 25, 1962], this is it. A reading of this record is convincing that impressions were annealed, and irrevocably so, "through the hammering, heating process of vigorous, running advocacy"[1] in which the star witness for the Carrier was pretty generally discredited as he continued his testimony over the course of a year and a half.[2]

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[1]Ohio Barge Line, Inc. v. Oil Transport Co., 5 Cir., 1960, 280 F. 2d 448, 449, 1961 AMC 375; and Bisso v. Waterways Transportation Co., 5 Cir., 1956, 235 F. 2d 741, 743, 1956 AMC 1760.

[2]The trial began and was adjourned on November 6, 1958, with this witness then under examination as an adverse witness. See Davis v. Parkhill-Goodloe Co., Inc., 5 Cir., 1962, ...F. 2d....., ..., ...AMC..... [No. 19294, ..., 1962]; June T., Inc. v. King, 5 Cir., 1961, 290

Consequently, we accept all credibility choices. We reject none of them. Our differences, such as they are, concern the legal significance of facts.

At the outset, this is not the case of the Shipper[3] not making a payment of the full amount of tariff freight charges. It is therefore not one in which anyone wants, or gets, a free ride. The trouble came from the fact that all of the ocean freight charges sought here[4] were paid in advance by the Shipper to the Freight Forwarder[5] acting for the Shipper. The Freight Forwarder did not, however, remit the funds to the local Agent[6] of the Carrier[7] as it had bound itself to do both as agent of the Shipper and also

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F. 2d 404, 406, n. 1, 1961 AMC 1431; Fall v. Esso Standard Oil Co., 5 Cir., 1961, 297 F. 2d 411, 417, ...AMC..... Nineteen months later he was the lead-off as the trial resumed June 7, 1960.

[3]There were actually two Shippers, A. J. Perez Export Company and Tyler Refrigeration Corporation. The cargo being moved was refrigerators from Niles, Michigan to Venezuela. Except where specifically mentioned, no significant difference exists and both are referred to merely as Shipper.

[4]*Shipped by Perez*

B/L	*Date*	*Freight Charges*
18	June 11, 1954	$ 1,506.52
16	June 23, 1954	1,577.15
6	July 2, 1954	1,011.70
4	August 6, 1954	822.19
40	November 26, 1954	2,961.09
Shipped by Tyler		
7	July 9, 1954	1,521.04
27	July 30, 1954	2,322.51
29	August 6, 1954	764.33

[5]Alonzo Shipping Company, Inc., engaged in the business of a Freight Forwarder in New Orleans.

[6]Isbrandtsen (New Orleans), Inc., the wholly owned Louisiana subsidiary of Isbrandtsen Company, Inc., was engaged in the business of steamship agent in New Orleans. Under formal contract it had been appointed by the Carrier "as its Agent in the Gulf Ports, Baltimore and Philadelphia, for the servicing of any and all vessels, owned, operated and/or managed or otherwise controlled by" the Carrier.

As compensation for these services the Agent was to receive commission on outward cargo ranging from 5% to 2½%.

[7]Compania Anonima Venezolana De Navegacion, a corporate agency of the Venezuelan Government.

pursuant to so-called "Due Bills" under which possession of the original signed bills of lading was released by the Carrier to the Freight Forwarder against the Forwarder's promise to pay freight charges within three days (or return the ladings). This credit had been extended, not by the Carrier, but by the Agent. The Carrier was not altogether blameless, for despite its tariff and bill of lading provisions requiring payment for freight without credit, it had taken the precaution of subjecting the Agent to an express guarantee.[8]

For many months the Agent treated this as a liability of the Freight Forwarder alone. The Agent did not even advise the Shipper of nonpayment of freight until the very eve of its own payment to the Carrier under its credit guarantee (note 8, supra). By that time, the Freight Forwarder was defunct, at least financially so. In remitting the full amount of the freight charges to the Carrier under its guarantee, the Agent made no reservation of rights. It was not until a month later that the Agent, through correspondence with the Carrier, attempted to give this remittance the character of an "advance" rather than a payment.[9] Even then the Agent was reiterating that the debt

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[8]The Agency Agreement provided:

"It is agreed that any and all due bills that Isbrandtsen may issue for freight and charges in connection with any cargo shipped from any of the ports at which it serves * * * as Agent, will be the exclusive responsibility of Isbrandtsen * * *."

[9]The check in the amount of $12,486.53 payable to the Carrier was sent by the Agent on May 24, 1955. On June 24, 1955, a letter from the Agent to the Carrier stated: "You also are aware that it has regretably been necessary for us to take legal action to collect the freights listed from the Shippers and/or [Freight Forwarders]. To do this, since they were on Venezuelan Line B/Ls, it was necessary to enter the legal action in the name of the Venezuelan Line.

"Will you, for the record and for certain technicalities which our lawyer sees arising, confirm that the check was sent you covers these items and that in the event you receive such a check or checks dealing with these B/Ls that it will be turned over to us since the money will

was due it by the Freight Forwarder.[10]

Of course it makes a lot of difference whether this is really a suit by the Carrier. If it is a suit by the Carrier, we can assume that by virtue of its filed tariffs expressly incorporating its bill of lading contract, conduct by the Carrier — no matter how inequitable — cannot excuse it from enforcing collection of freight, nor can harm innocently suffered by the Shipper — occasioned by the wrong doing of another (the Agent) — excuse it from paying the Carrier even though this means payment twice. That would follow from the rigorous policy which, to prohibit not only discrimination but the possibility of it,[11] gives to carrier tariffs the force of law.[12]

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be a replacement to us of the funds we paid you in carrying out our contract with you as per clause therein."

The record is a complete blank concerning agreement to, or acquiescence in, these statements by the Carrier.

[10]On June 10, 1955, the Agent filed a suit in the Louisiana State Court against the Freight Forwarder for the exact amount of the freight (see note 4, supra). This verified petition, after describing the custom and issuance of due bills for these specific shipments and the release of ocean bills of lading under them, alleged that "the bills of lading * * * in the * * * due bills constituted collateral security * * * for the payment of the freights * * *; that the freight monies represented thereby were loaned by [Agent] on the collateral security of such bills of lading * * *; that [Agent] is in the business of loaning money on such collateral security; that [the Freight Forwarder has] failed * * * to return such collateral security * * * or to make [Agent] a cash payment * * *."

On the very same day the libel was filed against Tyler; the one against Perez was filed on June 4, 1955.

[11]This policy has found expression by Congress in every statute regulating commerce since the early enactment of the Interstate Commerce Act. This includes the Shipping Act of 1916 and all of its amendments, 46 USCA §§ 812, 814-17, the Transportation Act, 49 USCA § 6(7), 49 USCA § 906(c), and the Civil Aeronautics Act, 49 USCA § 845(b).

[12]We have phrased it in many ways. Collection and payment of the charge for transportation "is not a mere matter of contract. For 'a rate once regularly published is on longer merely the rate imposed by the carrier but becomes the rate imposed by law * * *.' As a natural corollary to such a dynamic policy prohibiting the possibility of temptation to preferential discrimination * * * is the equally uncontradicted

The force of the District Court's findings, and for that matter the uncontradicted evidence, shows that the one seeking recovery is not the Carrier. The libel, to be sure, is brought in its name, but the real party in interest is the Agent. Both under accepted admiralty practice and that required under F.R. Civ. P. 17 (a), the libellant ought to have been the Agent as the real party in interest. 2 Benedict, Admiralty §§ 230, 245, at 43, 82-85; *Czaplicki v. SS Hoegh Silvercloud*, 1956, 351 U.S. 525, 529, 76 S. Ct. 946, 100 L. Ed. 1387, 1956 AMC 1465; *United States v. Aetna Casualty and Surety Co.*, 1949, 338 U. S. 366, 70 S. Ct. 207, 94 L. Ed. 171. But the inquiry does not end here. With all of its vaunted flexibility, admiralty would certainly provide some method by which the one paying (the Agent) — and hence the real party in interest — could have a judicial determination of the liability of the other (the Shipper) to him. The trial Court was correct therefore in concluding that the Agent, who paid the entire amount due to

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legal proposition that estoppel cannot be invoked against a common carrier to avoid a tariff provision. 'Neither the intentional nor the accidental misstatement of the applicable published rate will bind the carrier or shipper * * *.' It is clear that no 'act or omission of the carrier' can 'estop or preclude it from enforcing payment of the full amount' of the tariff charges. * * * And 'equitable considerations may not serve to justify failure of carrier to collect, or retention by shipper of, any part of lawful tariff charges.'" United States v. Associated Air Transport, Inc., 5 Cir., 1960, 275 F. 2d 827, 833.

River Terminals Corp. v. Southwestern Sugar & Molasses Co., 5 Cir., 1958, 253 F. 2d 922, 1958 AMC 1534, aff'd 360 U. S. 411, 79 S. Ct. 1210, 3 L. Ed. 2d 1334, and on remand 5 Cir. 1960, 274 F. 2d 36, 1960 AMC 2064.

In doing so, we simply echo imperative decisions. Crancer v. Lowden, 1942, 315 U. S. 631, 62 S. Ct. 763, 86 L. Ed. 1077 ("* * * tariffs bind both carriers and shippers with the force of law"); Atchison, T. & S. F. Ry. Co. v. City of Chicago, 240 F. 2d 930, aff'd, 357 U.S. 77, 78 S. Ct. 1063, 2 L. Ed. 2d 1174 ("A tariff under provision * * * requiring every common carrier to file * * * is to be treated the same as a statute."); and see also United States v. Kansas City So. Ry. Co., W. D. Mo., 1953, 116 F. Supp. 484.

Empire Petroleum Co. v. Sinclair Pipeline Co., 10 Cir., 1960, 282 F. 2d 913, is a vivid application of these principles.

the Carrier, as a sort of guarantor, indemnitor or quasi-surety, had the right to *seek* subrogation to the rights of the Carrier (as creditor) against the Shipper (as debtor or principal).

But to *seek* subrogation and to attain it are two quite different things. Once subrogation is recognized, it carries with it all of the rights which the subrogor had. 50 Am. Jur. Subrogation, §§ 110-112. That would include the extraordinary preferred status of a carrier asserting contractual "statutory" tariff rights (see note 12, supra). But it is the investiture of the subrogee with such sweeping vicarious rights which is itself a factor in determining whether subrogation is to be allowed.

This takes us to the very fundamentals of subrogation. It is now a mechanism so universally applied in new and unknown circumstances that it is easy to overlook that it originates in equity. Every facet, whether substantive or procedural, is controlled by the equitable origin and aim of subrogation. These principles, so well established that to cite cases would be an affectation, find expression in accepted texts, as the following excerpts reflect. "Legal subrogation is a creature of equity not depending upon contract, but upon the equities of the parties." 50 Am. Jur. Subrogation § 3 at 679. Through it equity seeks "* * * to prevent the unearned enrichment of one party at the expense of another * * *." § 4 at 681. It has "for its purpose the working out of an equitable adjustment and the doing of complete and perfect justice between the parties by securing the ultimate discharge of a debt by the person who in equity and good conscience ought to pay it, and prevent-

ing the sweeping away of the fund from which in good conscience the creditor ought to be paid." § 6 at 683-84. It has been "characterized as an eminently just doctrine, a pure, unmixed equity, one of the benevolences of the law, created, fostered, and enforced in the interest and for the promotion of equity and justice, and to prevent injustice." § 6 at 685. Applied as it now is, "it is broad enough to include every instance in which one person, not acting as a mere volunteer or intruder, pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter." § 7 at 686. It is "a consequence which equity attaches to certain conditions. It is not an absolute right, but one which depends upon the equities and attending facts and circumstances of each case." § 10 at 688. Because its object is "to do complete and perfect justice between the parties without regard to form or technicality, the remedy will be applied in all cases where demanded by the dictates of equity, good conscience, and public policy. Consequently, relief by way of subrogation will not be granted where it would work injustice, or where innocent persons would suffer, or where the result would be inimical to a sound public policy." § 11 at 690. As "subrogation is administered upon equitable principles, it is only where an applicant has an equity to invoke that the courts will interfere. Moreover, the equity of the party seeking subrogation must be strong and his rights clear, and his equity must be superior to that of other claimants." § 12 at 690-91. And it "will not be enforced to the prejudice of other rights of equal or higher rank, or to displace an intervening right or title, or to overthrow the equity of another person." § 13 at 691-92. Subrogation "is not an absolute right which a party paying the debt of another

may enforce at will, but rather, a matter of grace to be granted or withheld as the equities of the case may demand." § 16 at 693. The whole aim of subrogation "is the doing of equity and justice, and the relief will not be decreed where it will work an injustice, and so it cannot be invoked to the injury of innocent third persons." § 17 at 693.

In view of these equitable principles it is important to consider just what this case is. On the one hand is the Agent who is in the business of lending credit[13] to a party unworthy of the trust (the Freight Forwarder). On the other hand, is the innocent Shipper who paid the full amount of the charges to such defaulting party for remittance to the Agent.

Certainly on the facts found and necessarily implied, the Shipper must be considered innocent. The only mistake the Shipper made was to trust the Freight Forwarder. Otherwise its conduct was irreproachable. The Shipper knew it was required to prepay the freight charges. It divested itself of funds for all such freight charges. It chose a means — use of a freight forwarder — and of that group it selected one presumably considered by the shipping fraternity as reputable and competent. It followed the usual custom and practice of remitting ocean freight through that party, the Freight Forwarder. The business trustworthiness of that Freight Forwarder cannot now be questioned either by the Carrier or the Agent since the Agent considered it worthy of credit and entrusted to it the valuable shipping documents (bills of lading) against a mere promise to return them, or pay, or both.

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[13] See note 10, supra.

There is nothing in this record to charge the Shipper with knowledge that credit would be extended by the Agent (or the Carrier) to the Freight Forwarder to whom it had already furnished funds for the payment in cash of these charges. Nothing the Shipper did indicated that it either expected, or desired, the extension of credit. But it was this unknown extension of credit by the Agent to the Freight Forwarder that brought on the whole grief. Until that occurred, there was no risk to anyone. The Carrier thought the Agent retained the signed ocean bills of lading. The bills of lading would not be released until freight was paid. Funds for the payment of that freight had been put in the Freight Forwarder's hands. Hence, even if it is assumed that the Shipper mistrusted the Freight Forwarder, that misplaced faith caused no loss. The loss was occasioned wholly and solely by the voluntary act of the Agent in gratuitously extending credit to the Freight Forwarder and releasing bills of lading contrary to the provisions of the Carrier's tariff, the bills of lading themselves, and, more important, the imperative demands of the law.

It is harsh enough when, *vis-a-vis* Carrier and Shipper, it is the *law* that commands a shipper to pay twice if the carrier has not in fact received the money. It is shocking to say that *equity* would compel it. In the contest of relative equities, he who now seeks the Chancellor's grace has set the whole train of misfortune in motion. No longer having the "legal" standing of a carrier whose peremptory mace might compel a court of law to grant relief, the real libellant has naught but the gentle "wand of equity," *United States v. Maryland Casualty Co.*, 5 Cir., 1956, 235 F. 2d 50, 53, 1956 AMC 1822.

These factors attain only added vitality when consideration is given to other conduct of the Agent. Under the due bills the Freight Forwarder promised to pay the freight or return the bills of lading within three days. Thus, within four days of the release of the bills of lading, the Agent knew that the Freight Forwarder was not honoring its promise to pay or return. Nothing, absolutely nothing, was done by the Agent except some unidentifiable weak-kneed requests made of the Freight Forwarder to do as it had promised. Not a word was breathed to the Shipper until May 9, 1955 — more than five months after the one recent shipment in November 1954 and practicaly ten months as to all others (see note 4, supra). The explanation for this action — which the trial Judge characterized as incredible — was not hard to find. The Agent did not really try very hard, nor, by the nature of things, could he either press too strongly for payment by the Freight Forwarder, or take the extraordinary step of notifying the Shipper that the Freight Forwarder had defaulted on his trust. This was because competitive forces in the shipping business are so severe in the solicitation and booking of outbound export traffic, that the Agent, dependent upon its generated traffic for its compensation (see note 6, supra) did not wish to incur the ill will of the Freight Forwarder as a source of added business from other shippers in the future. And where excessive pressure on the Freight Forwarder to pay its obligations might be thought untactful, it was completely out of the question, so the Agent made clear, for it to embarrass this potential source of future business by exposing his infidelity, incompetence, or down right dishonesty to the principal (the Shipper). To collect the freight from the Freight Forwarder was important. But one cannot read

this record without the uncomfortable conviction that what was more important was preserving the good will of the Freight Forwarder lest traffic suffer tomorrow.[14]

The record is therefore uncontradicted that, with full knowledge that the Freight Forwarder had defaulted, and with complete indifference to whether the Shipper had, or had not, put the Freight Forwarder in funds, the Agent did nothing to advise the Shipper of this state of affairs.[15] In the meantime, the freight had been shipped and delivered.[16] The Shipper was given no chance, until it was too late, to do anything to salvage the loss which the Agent's traffic-hungry policies had created. That is laches, in its plainest

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[14]The trial Court had before it the extensive report of the Examiner in Docket No. 765 and 831 of the "Investigation of Practices, Operations, Actions, and Agreements of Ocean Freight Forwarders and Related Matters and Proposed Revision of General Order 72" which sets forth in such detail the abuses thought to result from freight brokers having such a competitive death grip on generated traffic with a resulting practical inability of ocean carriers to do anything which might incur the ill will of freight forwarders. This led to what Congress later described as "the crushing provision of the Board's revised General Order No. 72" requiring that forwarders "must look to the shippers, rather than to the carriers, for payment for their work." Congress rejected this by the passage of the independent ocean freight forwarders licensing amendment to the Shipping Act of 1916, Public Law 87-254; 75 Stat. 522, 46 USCA §§ 801, 841(b); 1 U. S. Code Congressional and Administrative News 1961, at 591. The Legislative History of the Act is at 2 U. S. Code Congressional and Administrative News 1961 at 2699 (S.R. 691; August 9, 1961, and H.R. 1096, August 21, 1961). See the subsequent decision of the Federal Maritime Commission in No. 831, January 23, 1962, 30 L.W. 2371.

[15]Actually as to the Tyler shipments, it was not mere silence. It was active concealment. In October-November 1954 it was discovered that several shipments presumably shipped months before were still on the dock in New Orleans because the Freight Forwarder had misused funds previously sent to it by Tyler. A procedure was then set up for Tyler to send payments direct to the Agent as to future shipments. But not a word was said about the Freight Forwarder's default as to the freight due on the three July-August shipments (see note 4, supra).

[16]This makes wholly irrelevant the collateral controversy as to whether the original signed bills of lading released to the Freight Forwarder under due bills bore the stamped, printed clause "freight to be prepaid" or "freight prepaid." The Carrier, by transporting and delivering the goods, obviously treated them as freight paid.

form. As such it bears equitable relief by one claiming an equitable status even though, as between Carrier and Shipper, limitations may not have run.

The Chancellor is no longer fixed to the woolsack. He may stride the quarter-deck of maritime jurisprudence[17] and, in the role of admiralty judge, dispense, as would his landlocked brother, that which equity and good conscience impels. *Hadjipateras v. Pacifica, S. A.*, 5 Cir., 1961, 290 F. 2d 697, 1961 AMC 1417; *Swift & Co. Packers v. Compania Colombiana Del Caribe, S. A.*, 1950, 339 U. S. 684, 70 S. Ct. 861, 94 L. Ed. 1206, 1950 AMC 1089; *Kossick v. United Fruit Co.*, 1961, 365 U. S. 731, 81 S. Ct. 886, 6 L. Ed. 2d 56, 1961 AMC 833.

Whatever equity the Agent could muster in its own behalf was not enough to tip the scales. The Court, with ample basis, thought that as between the two, the equities were overwhelmingly in favor of the Shipper, and to grant what the Agent sought would produce, not equity, but inequity. Subrogation as an equitable weapon may not thus be corrupted.

AFFIRMED.

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[17]Cf. United Geophysical Co. v. Vela, 5 Cir., 1956, 231 F. 2d 816, 819, 1956 AMC 745.

APPENDIX B

Excerpts, U. S. Shipping Act

Title 46 U.S.C.

Sec. 814 Contracts between carriers filed with Board

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Federal Maritime Board a true copy, or if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

* * * * *

Agreements existing at the time of the organization of the Board shall be lawful until disapproved by the Board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the Board.

All agreements, modifications, or cancellaitons made after the organization of the Board shall be lawful only when and as long as approved by the Board, and before or after disapproval it shall be unlawful to carry out in whole or in part, directly, or indirectly any such agreement, modification, or cancellation.

* * * * *

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

* * * * *

Sec. 815 Discriminatory acts prohibited

It shall be unlawful for any shipper, consignor, consignee, forwarded, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of

traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

* * * * *

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense.

Sec. 816. Discriminatory rates prohibited; supervision by Board

No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors.

* * * * *

Sec. 817 Carriers to establish, observe, and enforce reasonable rates and regulations

Every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for

transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 527

COMPANIA ANONIMA VENEZOLANA DE NAVEGACION (VENEZUELAN LINE),
Petitioner,

versus

A. J. PEREZ EXPORT COMPANY, ETC., and TYLER REFRIGERATION CORPORATION,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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May It Please The Court:

OPINIONS BELOW

The petition omits the "Opinion" of the District Court which is in the form of Findings and Conclusions as required by Rule 46½ of Supreme Court Admiralty Rules.

These Findings and Conclusions are printed in Appendix "A" hereof.

THE QUESTIONS PRESENTED

Petitioner would have the Court infer that this case involves conflicts between Circuits and interpretation of

"Congressional policy", "the United States Shipping Act" and a situation where there has been "favoring of shippers by a common carrier".

The plain truth is, as appears from the Trial Court's Findings of Fact, that the original carrier, the nominal petitioner herein, has no interest, whatsoever, in this litigation, now or formerly, because THE CARRIER HAD BEEN PAID THE FREIGHT CHARGES FOR ALL OF THE SHIPMENTS INVOLVED before these suits were begun.[1]

The only question ever presented in this litigation was whether the carrier's *agent*, found to have been guilty of laches,[2] should be allowed to reap any benefits from its unfair and inequitable conduct in consorting with a dishonest freight forwarder with whom that agent dealt throughout the transactions in suit.

The obvious answer, the one given by both lower courts, is that the agent should not prevail against these respondents.

THE FACTS

In the interest of brevity, respondents shall not attempt to traverse in detail petitioner's statement of the "Facts."

Instead, we submit that the facts of this case are those found by the District Court, accepted *in toto* by the Court

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[1]See Appendix "A", Finding No. 26.
[2]See Appendix "A", Findings Nos. 23 through 27; Conclusion No. VI.

of Appeals and unchallenged by petitioner. The facts are contained in Appendix "A" hereof.[3]

ARGUMENT

Respondents have no quarrel with petitioner's erudite recitation of so-called "Carrier Law": the *carrier* must collect its freights. However, here, the *carrier has collected its freights*[4] and, what is more, *the respondents have paid them.*[5] Therefore, no aspect of this case requires, or even allows, the application of any of the philosophies, policies or legal principles upon which petitioner so hopefully relies.

Since the carrier has collected the proper amount of charges for the shipments involved, and since the respondent-shippers have paid that same amount to the freight forwarder with whom the carrier's agent colluded, there has been neither a "failure of the carrier to collect" nor a "favoring of shippers".[6]

Consequently, when it says that the instant appellate opinion conflicts with the decision of the Court of Appeals for the Tenth Circuit in *Empire Petroleum Co. v. Sinclair Pipeline Co.*,[7] petitioner is departing materially from the facts.

Petitioner makes much of what it chooses to call an "unpermitted choice of Law of Subrogation."

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[3]R. pp. 375-382.
[4]R. p. 26; Appendix "A", Finding No. 26.
[5]R. p. 380, 381; Appendix "A", Findings Nos. 17 and 23.
[6]This is made abundantly clear by the opinion of the Court of Appeals: 303 F. 2d at page 694.
[7]282 F. 2d 913 (CCA 10th, 1960).

"Subrogation here", says petitioner, "is not derived from Admiralty or from the English Equity, but arises exclusively from Louisiana Law of Suretyship as a result of payment under a contract of guaranty made and to be performed in Louisiana."[8]

The first observation which must be made to the foregoing assertion is that, in so stating, the petitioner has apparently misread the Agency Agreement upon which it seeks to rely.

By its own terms, the agreement was to be performed in "the Gulf Ports, Baltimore and Philadelphia."[9] Consequently, how can petitioner say that Louisiana law is any more applicable to these transactions than Texas law, or Maryland law, or the law of the Commonwealth of Pennsylvania!

The second observation required is with respect to petitioner's reasoning that the subrogation law of Louisiana must control because the agency agreement is "non-maritime" and it "becomes involved in this case only by way of defense."[10]

To this contention we can but say that there is no basis. Apparently, petitioner concedes, as it must, that the cause of action which it has sought to assert against these respondents arises out of an alleged breach of a maritime contract, that is, an ocean bill of lading, several, in fact.[11] That such

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[8]Petitioner's Application, p. 23.
[9]Opinion of the Court of Appeals, 303 F. 2d at page 695, n. 6.
[10]Petitioner's Application, p. 23.
[11]The libels herein contain the plain averment that the claims asserted therein are "in a cause of contract, civil and maritime": R. pp. 2 and 10.

contracts are "maritime" is hardly open to dispute.[12] Nowhere, in its pleadings or proof, however, did petitioner ever sue these respondents on any agency or guaranty agreement. Respondents did not plead any guaranty agreement involving the petitioner. The only place any such contract of guaranty had in this litigation was to establish the "capacity" of *Isbrandtsen* to prosecute this action in the name of Venezuelan line, after the latter was found to have no real interest herein.[13]

But, once petitioner's *capacity* to prosecute the actions was established, we respectfully submit that maritime law, not the law of any state, determined the nature and extent of the substantive rights which could be asserted.

Thus, in the instant case, *Isbrandtsen* utilized this guaranty merely to show that it was not a "volunteer" in paying these freights to the carrier. Beyond that, the agreement cannot be used to abrogate any maritime law defenses which respondents possessed.[14]

The courts below, therefore, were not "free to choose" the law in the first place, and, consequently, *Erie R. Co. v. Tompkins*[15] is entirely irrelevant.

Notwithstanding the foregoing, and even assuming that Louisiana law were applicable here, the mere fact that our "subrogation" law happens to be in the form of codal articles does not thereby alter the principles upon which

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12See Gilmore and Black, The Law of Admiralty, pp. 20-21; 1 Benedict, On Admiralty, p. 27.
13 2 Benedict, On Admiralty, pp. 43, 88-85.
14So. Pacific Co. v. Jensen, 244 U. S. 205 (1917).
15304 U. S. 64 (1938).

it rests. As a matter of historical fact, our codified version and the so-called "equity" principles stem from a common seed: the Roman or civil law.[16]

Equity is no stranger to Louisiana jurisprudence.[17] Even in the face of literal statutory verbiage, equitable principles have been envoked to accomplish a just result by Louisiana courts.[18]

True it may be that Louisiana law is "express" to the extent of providing that one who is obligated to pay and pays the debt of another is "subrogated" to the creditor's rights against the co-debtor. However, the law does not even allude to the situation extant here, where the party otherwise entitled to subrogation has by its improper conduct "created", so to speak, the debt which is paid.[19]

In such circumstances, under Article 21 of the Louisiana Civil Code of 1870, we submit that a Louisiana court would be at liberty to "decide according to equity" by "an appeal . . . to natural law and reason" which are the underlying principles upon which the entire concept of "subrogation" is founded.[20]

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[16]83 C.J.S. 578-579.

[17]Article 21 of the Louisiana Civil Code of 1870 provides: "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent."

[18]See Leigh v. Wright, 183 La. 765, 164 So. 794 (1936).

[19]This is implicit in the Trial Court's Findings, particularly Findings Nos. 14, 19, 20, 21, 22, 23, 24, 25 and 27: Appendix "A"; see also Conclusion III: Appendix "A".

[20]83 C.J.S. 578-580.

In so doing, no court could be unmindful of the maxim that:

> WHERE ONE OF TWO INNOCENT PERSONS MUST SUFFER BY THE FRAUDULENT CONDUCT OF A THIRD, THE ONE WHO HAS, BY HIS NEGLIGENCE OR FAILURE TO DO SOMETHING THAT A PRUDENT MAN UNDER THE CIRCUMSTANCES SHOULD HAVE DONE, ENABLED THE FRAUD TO BE COMMITTED MUST SUFFER THE LOSS OCCASIONED THEREBY.[21]

The Trial Court's Finding is that this party, who seeks to assert a carrier's rights, "knew . . . that (the forwarder) had been paid in full by respondents for the amount of the freights here involved."[22]

The Trial Court unequivocally found that the carrier's agent, who now seeks to don the carrier's shoes, followed its "collusion course" to curry the favor of the forwarder, and thus advance its own selfish business interests.[23]

Applying the maxim to these facts, whether one reasons, as did the Appellate Court below, that such circumstances preclude the carrier's agent from *seeking* subrogation,[24] or whether one reasons that the agent may seek and obtain subrogation, but, then, must return that which its improper conduct caused these respondent-shippers to lose, the same

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[21] 83 C.J.S. 594.
[22] R. p. 381: Finding No. 24.
[23] R. p. 382: Finding No. 27.
[24] Opinion of the Court of Appeals, 303 F. 2d at page 696.

just result obtains: respondents are not called upon to pay these freight charges again.

CONCLUSION

Regardless, then, what route is employed to arrive at the just end result which has thus far obtained herein, there is no merit to this application for *certiorari* and the petition should be denied.

Respectfully submitted,

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APPENDIX "A"

FINDINGS OF FACT AND CONCLUSIONS OF LAW
ADMIRALTY NOS. 2793 & 2794

(Titles Omitted) (Filed: July 12, 1961)

CHRISTENBERRY, J:

These two actions involve claims for ocean freight charges on several shipments which respondents made via libelant's steamship line during 1954.

Respondents admit that libelant performed its contracts of carriage, but they deny liability on the following grounds:

(1) that the nominal libelant has no real interest in this controversy because it has been paid these freight monies, either by reason of respondents' payment thereof to a freight forwarder or by reason of the fact that libelant's agent remitted the monies to libelant, or by both;

(2) that the libelant is *estopped* to deny payment because of its conduct, through its agent, with the freight forwarder; and alternatively,

(3) that the claims are stale and time-barred because of libelant's laches in asserting them.

The cases were consolidated for trial because they involve substantially identical issues and were submitted by the

parties upon their respective pleadings, evidence, exhibits and arguments, after which the court took time to consider.

Now, upon due consideration, and pursuant to Supreme Court Admiralty Rule 46-1/2, the court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1.

Libelant, Compania Anonima Venezolana de Navegacion (hereinafter referred to as Venezuelan Line), is a foreign corporation, engaged in the steamship business, operating ocean freighter service from the Port of New Orleans to South America.

2.

Respondent, Tyler Refrigeration Corporation (hereinafter referred to as Tyler), is an American corporation, with its principal office in Niles, Michigan.

3.

Respondent, A. J. Perez Export Company (hereinafter referred to as Perez), is a partnership composed of Messrs. A. J. and Louis Perez, with its principal office in the City of New Orleans, Louisiana.

4.

During the year 1954, Libelant carried five shipments of ocean freight for Perez under the following bills of lading, dates and for the freight charges shown below:

B/L	*Date*	*Freight Charge*
40	11/26/54	$ 2,961.09
4	8/ 6/54	822.19
6	7/ 2/54	1,011.70
16	6/23/54	1,577.15
18	6/11/54	1,506.52
	TOTAL FREIGHTS	$ 7,878.65

5.

During the same year, libelant carried three shipments of ocean freight for Tyler under the following bills of lading, dates and for the freight charges shown below:

B/L.	*Date*	*Freight Charge*
7	7/ 9/54	$ 1,521.04
27	7/30/54	2,322.51
29	8/ 6/54	764.33
	TOTAL FREIGHTS	$ 4,607.88

6.

In each of these eight transactions, Venezuelan Line was represented by Isbrandtsen (New Orleans), Inc., (herein-

after referred to as Isbrandtsen), a Louisiana corporation, with its principal office in New Orleans.

7.

The selection of libelant's line and all arrangements for booking and clearing of the shipments were made by Alonso Shipping Company, Inc. (hereinafter referred to as Alonso), a Louisiana corporation, having its domicile in New Orleans.

8.

The business relationship between Isbrandtsen and Alonso had begun in about 1949, at which time Alonso applied to Isbrandtsen for "credit privileges" which, after investigation by Isbrandtsen, Alonso received.

9.

Neither respondent ever sought either directly or indirectly, any so-called "credit privileges" with libelant or its agent, Isbrandtsen, nor did either respondent seek such privileges for Alonso.

10.

On each of the transactions in suit, Alonso prepared the respective bills of lading on libelant's forms which were furnished to Alonso by Isbrandtsen.

11.

After completing the information on the bills of lading relative to the cargo markings, shipper, consignee, vessel, voyage and weights, Alonso returned the bills of lading to Isbrandtsen for completion as to freight charges, at which time Isbrandtsen perforated several of the documents with the word "copy" thus indicating they were copies of original bills of lading, and allowed Alonso to take the same, notwithstanding the multilithed word thereon; "PREPAID".

12.

When the cargo was received on board the vessel, Isbrandtsen acting for libelant, then inserted by rubber stamp the words "Original — Freight to be Pre-Paid" and signed several of the same bills of lading, which Alonso then forwarded to the consignees of the cargo overseas.

13.

After receiving the first copies, with the multilithed word "Prepaid" and libelant's authenticating "copy" perforation thereon, Alonso forwarded the same to respondents with its statement for services rendered and expenses incurred, including the ocean freight charges and, in all but two of the instances in suit, received payment in full prior to the time that the so-called original bills of lading were ever signed by Isbrandtsen.

14.

When libelant received the cargo on board and signed

the bills of lading, Alonso was allowed to receive them without prepaying the freight charges; instead, Alonso executed so-called "Due Bills" or "I.O.U.'s" which, in some instances, included freight charges for shippers other than either respondent herein.

15.

These due bills provided that they should be paid within three days of their respective dates, which correspond with the dates on the various bills of lading sued upon herein.

16.

In addition to the fee which Alonso charged respondents on each of the shipments herein involved, Alonso was also entitled to a commission of 2-1/2 per cent of the freight charges from libelant, which amount exceeded greatly Alonso's remuneration from respondents.

17.

Both respondents had remitted all of the freight charges and other amounts to Alonso long before libelant made any demand for payment upon respondents.

18.

Alonso dealt on a more-or-less daily basis with libelant, through Isbrandtsen, and a running tabulation was kept by libelant's agent of the monies due from Alonso on account of the due bills which Alonso signed.

19.

The system adopted by libelant's agent and Alonso for the payment of these due bills was not a chronological method of applying Alonso's remittances to the oldest due bill first but, on the contrary, Alonso's payments to Venezuelan were applied against whatever due bills, or items thereon, which the particular remittance would completely liquidate.

20.

Neither respondent ever acquiesced in, or had any knowledge of, this method of imputing payments.

21.

Because of the system adopted by Isbrandtsen and Alonso for the payment of the freights by Alonso, it is impossible to determine how much of respondents' remittances to Alonso was used by libelant to apply to the shipments of others on which Alonso had also been allowed credit privileges; the court infers, however, that this did occur over the period between the first and the last shipment made for each respondent herein.

22.

Notwithstanding the fact that the bills of lading required the pre-payment of freight charges, and notwithstanding the fact that the due bills signed by Alonso required payment within three days, neither libelant nor its agent ever made any demand for payment of these allegedly unpaid

freights upon either of these respondents, nor gave them any notice that it claimed Alonso had not paid the freights, until May 9, 1955, almost eleven months after the first shipment was made for Tyler; this delay the court finds both unreasonable and inexcusable. All demands for payment were made by libelant upon Alonso Shipping Co., Inc.

23.

In the interim between the first shipment and the demand upon respondents, Perez had remitted over Six Thousand Dollars and Tyler had remitted over Three Thousand Dollars to the failing and apparently dishonest Alonso.

24.

Libelant knew, through its agent, that Alonso had been paid in full by respondents for the amount of the freights here involved.

25.

Libelant's failure, under these circumstances, to notify respondents was highly prejudicial to them, in view of the financial difficulty into which libelant knew Alonso had fallen.

26.

On May 24, 1955, libelant received payment in full for the freights which are the subject of these suits, by virtue

of a remittance from its agent, Isbrandtsen, whom the court finds to be the real party at interest in this litigation.

27.

The court finds further that the reason for Isbrandtsen's failure to apprise respondents of the true situation with respect to Alonso was the hope of gain on the part of libelant's agent and an attempt to curry the favor of Alonso Shipping Company, Inc. by not exposing its defalcations to respondents. This was of no benefit to respondents.

CONCLUSIONS OF LAW

I.

The court has jurisdiction of the parties hereto and of the subject matter, a suit to recover ocean freights, which is within the admiralty and maritime jurisdiction of the United States.

II.

In admiralty, an action must be instituted by the real party at interest. Benedict, on Admiralty, Vol. 2, p. 43. However, it may also be said that the legal subrogation which occurred in favor of Isbrandtsen by virtue of its payment of these freights to Venezuelan Line included the right to pursue its collection remedy in Venezuelan's name. Benedict, on Admiralty, Vol. 2, pp. 82-85. Because of the view taken by the court, this issue is moot; since Isbrandtsen was the *alter ego* of Venezuelan Line throughout the transactions in suit, neither can acquire any better rights

than the other against these respondents by virtue of any subrogation. See Am. Jur. Subrogation, Sec. 3; see also *U. S. Fidelity and Guaranty Co. v. Wooldridge*, 295 F. 847, 849 (CCA 5th, 1924).

III.

The question of whether Alonso was the agent of respondents or of libelant, with respect to the collection of the freights involved, is likewise immaterial, because this is not a situation in which the court deems it pertinent to determine this question. (But see *Alcoa SS Co. v. Graver*, 1953 AMC 844, 846 (C. Ct. N. Y., 1953) Furthermore, the maxim, that as between an innocent principal and an innocent third party, the principal must bear the risk of his agent's infidelity, is inapplicable here because the "third party", Venezuelan Line, was not an "innocent party" in view of its knowledge of Alonso's defalcations and its failure to apprise these respondents thereof in order that they could have protected themselves by discontinuing their dealings.

IV.

In the circumstances of this case, libelant is estopped to deny that it has been paid in full for the freight charges because of the fact that the conduct of its agent in circulating the "Prepaid" copies of, and the "Freight to be Pre-paid" originals of, the bills of lading induced these respondents to settle their accounts with Alonso, to their patent detriment. Restatement of the Law of Agency, Section 183; See also *Hyde v. Wolf*, 4 La. 234, 236 (1832) and 2 Am. Jr., Agency, Sec. 354, p. 276 and Sec. 399, p. 313.

V.

In addition, the court concludes that libelant dealt with Alonso as principal throughout these transactions, as evidenced by the facts that it was Alonso's credit which was established with libelant's agent and no benefit inured to respondents therefrom; the account was kept in the name of Alonso; imputation of payments was made without regard to any considerations other than libelant's convenience; and no demand was ever made upon these respondents, except as an afterthought, on libelant's part until almost a year after the first transaction in each case. In these circumstances, with knowledge of respondents' identities from the inception of these transactions, libelant cannot now look to respondents for payment. See 2 Am. Jr., Agency, Sec. 356, p. 277 and *Hyde v. Wolf, supra; Alcoa Steamship Co. v. Graver Tank & Mfg. Co.*, 1953 A.M.C. 844; cf *Alcoa SS Co. v. Comfort Spring Corp.*, 1959 A.M.C. 1017.

VI.

Even if it be said that these respondents must take the consequences of Alonso's misapplication of their funds because Alonso was respondents' agent, libelant and its agent were guilty of such inexcusable delay in asserting these claims and prejudiced respondents' position so severely thereby that libelant and its agent are guilty of such laches that it would be inequitable to allow either of them to enforce these claims, if any there were, against respondents. *Czaplicki v. S. S. Hoegh Silvercloud*, 351 U.S. 525, 1956 A.M.C. 1465 (1956).

VII.

Respondents are entitled to a decree dismissing these libels at libelant's cost, which decree has already been entered by the court.

New Orleans, Louisiana, July 12, 1961.

/s/ Herbert W. Christenberry
UNITED STATES
DISTRICT JUDGE

CERTIFICATE

I, the undersigned member of the Bar of this Court, do hereby certify that I have served a copy of the foregoing brief upon proctor for petitioner, James J. Morrison, Esq., by delivering the same to his offices at 1007 National Bank of Commerce Bldg., New Orleans, Louisiana, this __ day of November, 1962.

Samuel C. Gainsburgh

Office Supreme Court, U.S.
FILED
DEC 10 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 527

COMPANIA ANONIMA VENEZOLANA
DE NAVEGACION (VENEZUELAN LINE),
Petitioner-Libelant Appellant Below

versus

A. J. PEREZ EXPORT COMPANY, ETC., and
TYLER REFRIGERATION CORPORATION,
Respondents-Appellees Below

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI

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MAY IT PLEASE THE COURT:

Respondents have filed a brief in opposition to the petition for a writ of certiorari herein, and except for petitioner's own lack of precision in its Petition this supplemental memorandum may not have been necessary.

I. SUBROGATION AND CHOICE OF LAW

Petitioner was unprecise in references to Venezuelan Line and Isbrandtsen, their relationship, and the nature of the payment giving rise to the subrogation in question, in its Petition for Certiorari. Venezuelan Line is a corporate agency of the Venezuelan Government, domiciled in Venezuela. In its Answer to Interrogatories,[1] Venezuelan Line states:

> "1. We, Venezuelan Line, were represented by Isbrandtsen, (New Orleans) Inc., a Louisiana Corporation with its principal office and place of business located at Sandlin Building, 442 Canal Street, New Orleans, Louisiana.
>
> 4B. There was in effect between ourselves and Isbrandtsen, (New Orleans) Inc., the following provision of Isbrandtsen's agency contract . . . relative to the handling of the bills of lading sued on herein:
>
> > '. . . all due bills that Isbrandtsen may issue for freight , . . will be the exclusive responsibility of Isbrandtsen.'
>
> 6. . . . an amount equaling the total freight charges was received by us from Isbrandtsen, (New Orleans) Inc., pursuant to the indemnity agreement above referred to . . ."

Petitioner, in its Petition for Certiorari, has insisted that the above agency agreement between Isbrandtsen, (New Orleans) Inc. and Venezuelan Line was a Louisiana Contract, and that the incidents of payment pursuant to

[1] See Record, pp. 27-30.

the indemnity agreement therein contained (including subrogation) was governed exclusively by Louisiana Law.[2] Respondent has accused petitioner of "misreading the Agency Agreement upon which it seeks to rely," and, pointing out that it was "to be performed in the Gulf Ports, Baltimore and Philadelphia" asks "how can petitioner say that Louisiana law is any more applicable . . . than Texas law, or Maryland law, or the commonwealth of Pennsylvania!"[3]

The answer is obvious, and shows only how completely mixed up over choice of law both respondent, and the lower court, have been in this case. It must be obvious that *all* of the above laws, plus maritime law and English Equity, conflicting as they do, cannot possibly be applicable at once!! And it must further be obvious that the only possible choices really lie between Louisiana Law on the one hand, and the Law of Venezuela, the other contracting party's domicile, about which everyone has apparently forgotten! But fortunately, the solution is completely clear, and dictated both by the Louisiana Civil Code and even the common law of Conflicts of Laws, though the latter is inapplicable.

In Louisiana, an agency agreement is a contract of mandate,[4] which is complete "only by the acceptance of the mandatary."[5] Article 10 of the Louisiana Civil Code expressly provides:

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[2]See Petition, pp. 22-27.
[3]See Respondent's Brief, p. 4.
[4]Louisiana Civil Code, Article 2985.
[5]Id., Article 2988.

> "The form and effect of . . . private written instruments are governed by the laws and usages of the places were they are passed or executed.
>
> But the effects of acts passed in one country to have effect in another country, is regulated by the laws of the country where such acts are to have effect."

The Louisiana Courts have held:[6]

> "... these contracts were Louisiana contracts, because the last steps in the completion thereof were to be performed in Louisiana."

As the "last step" to the completion of the Isbrandtsen, (New Orleans) Inc. Agency Agreement was the "acceptance of the mandatary" at its legal domicile in New Orleans—where the contract of mandate was "to have effect" despite incidental duties thereunder elsewhere — it is clear that pursuant to Article 10 of the Louisiana Civil Code the agency agreement or contract of mandate was "passed or executed" at New Orleans, and created under, effective pursuant to, and governed by, the Law of Louisiana, where every act involved in this case was done and performed, and which additionally is the *lex fori*. Even *Corpus Juris Segundum* agrees, saying:[7]

> "The cases abound in the statements to the effect that, as a general rule, the law of the place where a contract is made or entered into governs with respect to its nature, validity, obligation and in-

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[6] *Caldwell & Co. v. Deschanel International Corp.*, 6 La. App. 802.

[7] 15 C.J.S., pp. 883-885, *Verbo* "Conflict of Laws," Sec. 11(b). See also RESTATEMENT, *Conflict of Laws*, Sec. 332; 312-331; *Goodrich*, CONFLICT OF LAWS (2d ed.) 274-5.

terpretation. This has been said to be the rule even though the place where the contract was made is different from the place where it is to be performed, and particularly so if the place of making and the place of performance are the same. . . .

The American Law Institute has adopted the rule that the law of the place of contracting determined the validity and effect of a contract. . . .

The question of what is the place of making of a contract . . . is, broadly stated, the place where the final act occurs which makes the transaction a binding contract."

The Restatement expressly sanctions Article 10 of the Louisiana Civil Code, providing:[8]

"The law of the forum decides as a preliminary question by the law of which state questions arising concerning the formation of a contract are to be determined . . ."

Thus as certainly as the non-maritime contract of agency between Isbrandtsen (New Orleans) Inc. and Venezuelan Line cannot be governed by maritime law,[9] it can only be governed by Louisiana law; and the court below was in grievous error in governing it by English Equity.

II. LOUISIANA "EQUITY" BEARS NO RELATION TO "ENGLISH EQUITY", WHICH IS CONSTITUTIONALLY BARRED FROM LOUISIANA

Respondent even attempts to convince this Court that the English Chancellor's Equity applied in this case to

[8] RESTATEMENT, *Conflict of Laws*, Sec. 311.
[9] See Authorities cited Petition, pp. 23-24.

thwart and defeat the Louisiana law of automatic subrogation is the same as the "equity" authorized by Article 21 of the Louisiana Civil Code.[10] But nothing can be further from the truth. English Equity is anathema to Louisiana Civil Law, and is excluded from the State of Louisiana by no less authority than the Louisiana Constitution itself!![11]

Even the redactors of the very first versions of Article 21 were careful to differentiate the "equity" there referred to as a formula for expressing in terms of 18th Century idealistic lego-philosophy the juridical method of the Civilian Law, and rejected flatly any implication that the use of the term authorized a judge to set "equity" in opposition to "law," as the Fifth Circuit Court has done in this case.[12] Thus, Portalis, one of the Redactors of the French Projects for a Civil Code — the source of Article 21, said:

> "Thus in Rome the praetor did not apply the law when he believed it contrary to natural equity. He introduced the actions of 'good faith' in order to escape the laws which had established exact formulae for each action; in England, the court of equity . . . often made decrees (reglemens) in order to change the laws (los lois): *but this is not how this article works.* Our article only fits the cases where the law is obscure or insufficient and the cases where there is even no law. In these several instances should the judge surrender his calling or fulfill it? (Emphasis added).

This legal principle continues to exist so strongly in

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[10]See Respondent's Brief, pp. 5-8.

[11]LOUISIANA CONSTITUTION OF 1921, Art. 3, Sec. 18.

[12]For a full discussion of the subject, including the following quote, see Franklin, *Equity in Louisiana, The Role of Article 21*, 9 Tulane L. Rev. 485.

Louisiana that the Louisiana Supreme Court has said:[13]

> "If, when the state was admitted into the Union, the inhabitants had preferred the systems of common law and equity which had been adopted by the other states, they, too, would, no doubt, have adopted them. But, instead of so doing, they incorporated in the first state Constitution (adopted in 1812) the provision and prohibition (article 4):
>
> > " 'Sec. 77. . . . the Legislature *shall never adopt any system* or code *of laws by a general reference to the said system* or Code, but in all cases shall specify the several provisions of the laws it may enact. (Emphasis added).
>
> "What the Legislature did (after some years) with reference to equity was, not to adopt the system as it then existed elsewhere (whether it was capable of overriding the law, according to the conscience of the chancellor and the exigencies of the particular case, or according to fixed principles applicable to all cases alike), but to declare that:
>
> > " 'In civil matters, where there is no express law, the judge is bound to proceed * * * according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, *where positive law is silent.*' Civ. Code, art. 21.
>
> "Since 1812 there have been seven Constitutions adopted in Louisaina, exclusive of that with which she became a state, and inclusive of one which is not yet two years old, and *each has contained the*

[13] *LeBlanc v. City of New Orleans*, 138 La. 243, 70 So. 212.

> *same original prohibition against the adoption of 'any system of laws' especially directed, as is well known historically, against the . . . 'equity' systems established in the other states.* The ordinary measure of the jurisdiction of our courts, sitting in equity (if such an expression can be used), has therefore never been, and is not now, the measure by which the jurisdiction of chancery courts in general is determined, but has been, and is, and must be, neither greater nor less than as fixed in the written grant whereby it has been, and is now, conferred; and the precedents established by chancellors who are administering a system thus prohibited in this state, not of law, but of jurisprudence, which still prevails against the law, . . . must, in the nature of things, be considered with respectful caution by courts which administer written law, and can appeal to equity (defined to be 'natural law and reason or received usages') *only when the written law is silent.* (Emphasis added).

Hence it is shocking to find, thanks to the decision of Fifth Circuit Court of Appeals in this case, an English Chancellor lurking under every word of a strictly non-maritime Louisiana contract entitled to be governed, interpreted, and applied, according to Louisiana law, fully armed with a magic wand ready to wave it at the whimsey of a Federal judge "capable of overriding the law, according to the conscience of the chancellor and the exigencies of the particular case," in flat defiance of the Louisiana law, the Louisiana Constitution, and of the Supreme Court of the State of Louisiana!!

That such invasion of the Federal judiciary of the sovereignty of the State of Louisiana, and such brushing

aside of state law, is both unconstitutional and contrary to the policy of this Honorable Court is fully demonstrated in our original petition for certiorari,[14] and cries out for review and rectification. To heap the English Chancellor and his veto of law on top of Louisiana Civil Law in express violation of Louisiana's Constitutional prohibition against him and his magic wand capable of making Louisiana law disappear, truly reduces Louisiana to second-class citizenship in a Union of supposedly equal sovereign states!

Respondent, in its Brief at p. 7, apparently admitting that the decision below on this ground is insupportable, suggests an alternate decision:

> "that the agent may seek and obtain subrogation, but, then, must return that which its improper conduct caused these respondent-shippers to lose. . ."

That is an issue we would be glad to meet, but respondents have neither pleaded nor proved that they lost one dime by any "improper conduct" of Isbrandtsen (New Orleans) Inc. or Venezuelan Line — but only by the embezzlement of their own agent of their own funds they alone entrusted to him. Having the Chancellor's "grace," respondents are relieved from all proof of loss, fault, or proximate cause, it would otherwise be their burden to bear under the law of Louisiana!!!

III. PLEA OF PAYMENT

It will be observed that Respondents, in their brief,[15] have reurged the plea of payment,[15] and reprint the Trial

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[14]See pp. 23-24, 30.
[15]Brief pp. 2-3, 7.

Court's Findings and Conclusions as an Appendix in support thereof. Suffice it to say that this is so far-fetched that even the Court of Appeals could not go along, observing:

> "Our differences (with the District Court Judge), such as they are, concern the legal significance of facts."

IV. COLLUSION DEFEATING POLICY OF UNITED STATES SHIPPING ACT ADMITTED BY RESPONDENTS

One would think that Respondent's way of stating the case on page 3 of its Brief admits that the decision of this case in its favor violates every principle and policy of the Shipping Act. The whole purpose of that Act is to prohibit collusion between carriers and their agents on the one hand, and shippers and their agents on the other hand. Yet respondents admit:

> ". . . since the respondent-shippers have paid the same amount to the freight forwarder with whom the carrier's agent colluded, there has been neither a "failure of the carrier to collect" nor a "favoring of shippers."

But is not the very purpose of the Shipping Act to prevent such "collusion," and to keep both carriers and their agents (who even the District Court characterized as "*alter-ego*")[16] off what respondent aptly characterizes as a " 'collusion course' to curry favor of the forwarder (i.e. the shipper's agent), and thus advance its own selfish

[16]See District Court Conclusions of Law II, Respondents' Brief p. 17.

business interests"?[17] How else can a carrier, through its agent, maintain a "collusion course" with a shipper or his forwarding agent except by rebating freights and thus favoring shippers and/or their forwarding agents contrary to the Shipping Act? And is the Shipping Act any the less violated because the rebate is received by the shipper's forwarding agent rather than by the shipper itself? Indeed, is not the pressure to rebate freights heavier in favor of the forwarder than the isolated shipper, whose economic power is such that the Fifth Circuit Court described it as follows:[18]

> The Agent did not really try very hard, nor, by the nature of things, could he either press too strongly for payment by the Freight Forwarder, or take the extraordinary step of notifying the Shipper that the Freight Forwarder had defaulted on his trust. This was because competitive forces in the shipping business are so severe in the solicitation and booking of outbound export traffice, that the Agent, dependent upon its generated traffic for its compensation (see Note 6, supra) did not wish to incur the ill will of the Freight Forwarder as a source of added business from other shippers in the future. And where excessive pressure on the Freight Forwarder to pay its obligations might be thought untactful, it was completely out of the question, so the Agent made clear, for it to embarrass this potential source of future business by exposing his infidelity, incompetence, or down right dishonesty to the principal (the Shipper). To collect the freight from the Freight Forwarder was important. But one cannot read this record without the uncomfortable

[17] Respondent's Brief, p. 7.
[18] See Petition, Appendix A, p. 45-46.

conviction that what was more important was preserving the good will of the Feight Forwarder lest traffic suffer tomorrow."

Is not the whole regulatory scheme of things envisioned by the Shipping Act threatened and upset by such pressures resulting in rebates which not only represents violations of law in failing to collect full freights, but unfair competition to competing carriers, and opens the door to ruinous rate reductions among carriers to induce shippers to leave forwarders who put the illegal rebates in their own pockets, as did Alonzo here, and obtain the benefit of lower freights themselves? Indeed, does this not open the whole Pandora's Box of rebate, rate reduction, unfair competition, interruption or reduction of service, and ultimate crippling of the American Merchant Marine sought to be guarded against by the Shipping Act, whether the freights are not collected from shipper or forwarder by carrier or agent, willy-nilly or in any combination?

And still, respondent fails to explain why, in this case alone, the shipper is excused from his own law violation, and is permitted to have his cargo carried free without prepayment of freights — but simply upon advancing same to his own freight forwarder — contrary to bill of lading provisions, in violation of tariffs filed with the Federal Maritime Board, and contrary to the provisions and policy of the Shipping Act, regardless of any "collusion" with the carrier or his agent. Even respondent admits that petitioner relies on correct "Carrier Law"; and to argue that "respondents have paid them (the freights)" is as purile as to argue that "the carrier has collected its freights" (Brief p. 3) in the face of the undisputed record that re-

spondents only *advanced* the freights to its own forwarding agent, who embezzled them, and the carrier collected, not the freights, but a contractual indemnity from its agent. Such a holding violates every principle of Carrier Law!

V. CONCLUSION

It is therefore respectfully suggested that the complained of decision of the court below should be reviewed by this Honorable Court and reversed for the reasons set forth here, as well as in the original Petition for a Writ of Certiorari.

Respectfully submitted,

JAMES J. MORRISON
1007 National Bank of Commerce Building
New Orleans 12, Louisiana
Proctor for Petitioner, Venezuelan Line

PROOF OF SERVICE

I, James J. Morrison, Proctor for Compania Anonima Venezolana De Navegacion (Venezuelan Line), petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify, pursuant to Rule 33, 3(b), that on the 6th day of December, 1962, I served copies of the foregoing Supplemental Memorandum in Support of Petition for Certiorari to the United States Supreme Court on Tyler Refrigeration Corporation and A. J. Perez Export Company, respondents, by mailing a copy in

a duly addressed envelope, first class postage prepaid, to Messrs. Kierr and Gainsburgh, 1740 National Bank of Commerce Building, New Orleans 12, Louisiana, their counsel of record.

JAMES J. MORRISION